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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-352

JOSEPH COLOMBO,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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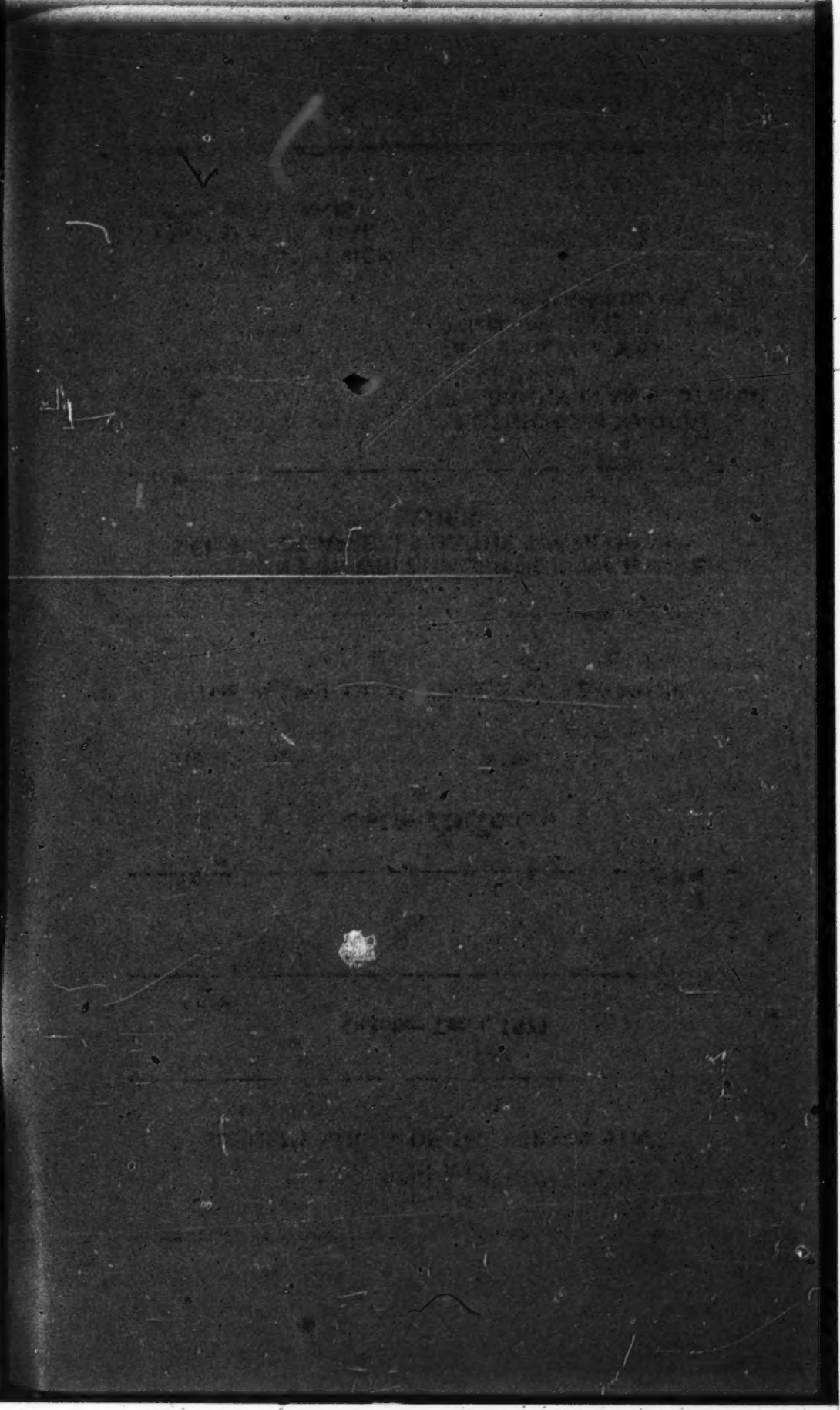

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	6
Reasons for Granting the Writ	11
Conclusion	17

CASES CITED

Benton v. Maryland, 395 U.S. 784, 23 L.Ed. 2d 797, 89 S.Ct. 2056, decided June 16, 1969	12,13,15
Colombo v. New York, 8 CRL. 4023, 39 L.W. 3161	2
Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1873)	12
Helvering v. Mitchell, 303 U.S. 391	12
Matter of Koota v. Colombo, 17 N.Y. 2d 147, certiorari denied 384 U.S. 1001	7,16
Palko v. Connecticut, 302 U.S. 319	12

Page

People v. Colombo, 29 N.Y. 2d 2

People v. Colombo, 25 N.Y. 2d 641, 306 N.Y.S. 2d 258 2,10

People v. Colombo, 32 A.D. 2d 812, 302 N.Y.S. 2d 488 2,9

Waller v. Florida, 397 U.S. 387, 25 L. Ed. 2d, 435, 38 LW. 4263 (Dec'd April 6, 1970) 10,13,15

Other Authorities

FEDERAL STATUTES — 28 U.S.C. 1257 Sec. 3 2

New York State Constitution, Article 1, Section 6 (McKinney's Const. Art. 1, Sec. 6) 4,11

New York Statutes

Former Penal Law: Sections 600(6), 601, 602 ... 4,5,13

Judiciary Law: Sections 750(a)(3), 750(5), 755 .. 5,6,14

Appendices

Page

Appendix A - Remitur A-1

Appendix B - Opinion of the Court of Appeals B-1

Appendix C - Supreme Court of the United States—Journal of Proceedings C-1

Appendix D - Decision of the Court of Appeals Denying the Motion for Reargument and Amending the Remittur D-1

Appendix E - Opinion of the Court of Appeals E-1

Appendix F - Memoranda of Court of Appeals F-1

Appendix G - Opinion of Appellate Division G-1

Appendix H - Opinion Court of Appeals H-1

Appendix I - Order Granting Motion to Dismiss Indictment — Peo. v. Joseph Colombo I-1

Appendix J - Opinion Court of Appeals J-1

Appendix K - Order of the Supreme Court, Kings County, in the First Matter Entitled Koota vs. Colombo K-1

Appendix L - Indictment (Peo. v. Joseph Colombo) L-1

Appendices

Page

Appendix A - Remittur A-1

Appendix B - Opinion of the Court of Appeals B-1

Appendix C - Supreme Court of the United States Journal of Proceedings C-1

Appendix D - Decision of the Court of Appeals Denying the Motion for Reargument and Amending the Remittur D-1

Appendix E - Opinion of the Court of Appeals E-1

Appendix F - Memoranda of Court of Appeals F-1

Appendix G - Opinion of Appellate Division G-1

Appendix H - Opinion Court of Appeals H-1

Appendix I - Order Granting Motion to Dismiss Indictment - Peo. v. Joseph Colombo I-1

Appendix J - Opinion Court of Appeals J-1

Appendix K - Order of the Supreme Court, Kings County, in the First Matter Entitled Koota vs. Colombo K-1

Appendix L - Indictment (Peo. v. Joseph Colombo) L-1

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No.

JOSEPH COLOMBO,

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-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, JOSEPH COLOMBO, hereby petitions for a Writ of Certiorari to review the order of the Court of Appeals of the State of New York entered in this proceeding on June 10, 1971 which affirmed the order and judgement of the Court of Appeals decision of October 30, 1969, which

affirmed the order and judgment of the Appellate Division, Second Judicial Department reversing the Judgement of the Supreme Court, Kings County.

OPINIONS BELOW

The decision of the Court of Appeals appears as Appendix B hereto, and is reported as 29 N.Y.2d 1. The proceeding in the Supreme Court of the United States is reported as 8 CRL. 4023, 39 L.W. 3161 and appears here as Appendix C.

The first (prior to remand) memoranda of the Court of Appeals, appears as Appendix F hereto, and is reported in 25 N.Y. 2d 641, 306 N.Y.S.2d 258. The opinion of the Appellate Division, Kings County, reported in 32 A.D. 2d 812, 302 N.Y.S.2d 488 appears herein as Appendix G.

The opinion of the Supreme Court, Kings County, printed as Appendix H hereto, is not reported.

JURISDICTION

The original judgement and order of the Court of Appeals was entered on October 30, 1969. (See Appendix E). A timely petition for rehearing was denied on February 26, 1970 (See Appendix D), and a petition for certiorari was filed within 90 days of that date. On October 19, 1970 the Supreme Court of the United States granted certiorari and remanded this matter back to the Court of Appeals (see Appendix C).

On June 10, 1971 the Court of Appeals of the State of New York after reargument adhered to their original decision of October 30, 1969 (see Appendix B) and this petition for certiorari was filed within 90 days of that date. The

jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

1. Whether two successive prosecutions of the petitioner arising out of the same conduct violates the constitutional guarantee against double jeopardy as provided in the Fifth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

The following are the relevant portions:

(a) The Fifth Amendment to the Constitution of the United States;

"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;..."

U.S.C.A. Const. Art. 5.

(b) Article I, Section 6, of the Constitution of the State of New York;

"No person shall be subject to be twice put in jeopardy for the same offense:...."

McKinney's Const. Art. 1 Sec. 6.

STATUTES

The following are the relevant portions:

(c) Section 600 of the former Penal Law of the State of New York provides:

Criminal Contempt

"A person who commits a contempt of court of any one of the following kinds, is guilty of a misdemeanor:...(Subdivision 6) Contumacious and

unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory."

(d) Section 601 of the former Penal Law of the State of New York provides:

Punishment for Criminal Contempt

"A criminal act is not the less punishable to a crime, because it is also declared to be punishable as a contempt of court."

(e) Section 602 of the former Penal Law of the State of New York provides:

Indictment for Contempt

"Punishment for a contempt, as prescribed in Article nineteen of the Judiciary Law, does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment."

(f) Section 750 Judiciary Law of the State of New York provides:

"A court of record has power to punish for criminal contempt, a person guilty of any of the following acts..."

"5. Contumacious and unlawful refusal...after being sworn, to answer any legal and proper interrogatory."

(g) Section 755 of the Judiciary Law of the State of New York provides:

When punishment may be summary: Where the offense is committed in the immediate view and presence of the court...upon a trial or hearing, it may be punished summarily..."

STATEMENT OF THE CASE

The petitioner Joseph Colombo had been subpoenaed to appear before the Grand Jury of the County of Kings on July 14, 1966. The petitioner informed the District Attorney that he wished to appear and testify before the Grand Jury. He was excused and never called before this Grand Jury (63-64).[1]

Petitioner Joseph Colombo was thereafter indicted on or about November 10, 1966; charging him with criminal contempt of court in violation of Penal Law Sec. 600, Subd. 6, for his alleged "contumacious and unlawful refusal, after being duly sworn, as a witness, to answer to legal and proper interrogatories" (5, 166).

The District Attorney conceded that this indictment against the petitioner was based solely on petitioner's original refusal on December 7, 1965 to answer questions before the Grand Jury of the County of Kings and for which he was adjudged in criminal contempt of court on December 15, 1965, pursuant to Sec. 750 of the Judiciary Law, and for which he had served a jail sentence of 30 days and paid a fine of $250 (169). (See Appendix K)

Judge Barshay in that case in his Memorandum Opinion dated December 8, 1965, had found Joseph Colombo guilty

[1]The page citations are to the Record in this case.

of *criminal contempt* in that the petitioner "has wilfully disobeyed the lawful mandate of this Court to answer legal and proper interrogatories." This conviction was affirmed, *Matter of Koota v. Colombo*, 17 N.Y. 2d 147, 269 N.Y.S. 2d 393, 216 N.Y.2d 568, certiorari denied 384 U.S. 100. (See Appendix J) — specifically affirming a *criminal contempt* conviction.

Petitioner had offered to go before the Grand Jury on May 9, 1966 and testify after a stay of the execution of sentence to wit: 30 days in jail and fine of $250 had expired, but the District Attorney refused to permit him to appear before the Grand Jury and testify (168), although on October 20, 1965, the District Attorney had indicated to Judge Barshay "If any witness wants to testify at any time I will be happy to have him." The court asked whether "proceedings against him will be dropped" and the District Attorney replied, "Automatically" (173-174). However, he was imprisoned, notwithstanding the fact that he offered to testify. (See Memorandum by Damiani, J., Appendix H).

The Grand Jury then returned the instant indictment against the petitioner on October 10, 1966, based upon the same act of criminal contempt for which the petitioner had been convicted — pursuant to order of Judge Barshay on December 15, 1965.

Petitioner filed a Motion to Dismiss the Indictment (10-12). In this motion petitioner contended that this indictment (see Appendix L) placed him in double jeopardy (10-11). He further argued that he was denied a fair hearing before the Grand Jury (11-12).

Judge Damiani in an Opinion dated July 20, 1966, dismissed the Indictment on the ground that the Grand Jury was not apprised of appellant's willingness to testify before the Grand Jury, suggesting that the District Attorney should "accept the offer of the defendants to testify and recall them before the Grand Jury" (175). The court refused the consideration of the question of double jeopardy (171). (See Appendix H)

The court stated after reviewing the Grand Jury Minutes: "It is my opinion that they failed to establish that the defendants' refusal to answer the Grand Jury's questions was contumacious and wilful. Even if it be assumed that the Minutes are sufficient on their face, in fairness to the defendants, the Indictment should be dismissed and the case resubmitted to the Grand Jury so that the Minutes of all of the proceedings before the present Presiding Justice may be submitted to it and that it may be made aware of all of the facts concerning the defendants' conduct herein" (171). This was never done by the district attorney.

The Transcript of Grand Jury Minutes dated October 10, 1966 (95-107) proves conclusively that the Grand Jury was never informed that petitioner Joseph Colombo, although resubpoenaed to appear before this Grand Jury on July 14, 1966, had offered to testify. The Grand Jury was given a transcript of the original testimony of Joseph Colombo on October 14, 1965 (115-119) and an application to punish for contempt of court for refusal to testify before the Grand Jury (121-164).

An appeal was taken by the State to the Appellate Division of the Supreme Court, Second Department, from the Order

Dismissing the Indictment (3).

On June 19, 1969 the Order which granted the Motion of appellant Joseph Colombo was reversed and an Opinion was filed. (See Appendix G) *People v. Colombo*, 32 A.D.2d 812, 302 N.Y.S.2d 488.

The question of fair hearing before the Grand Jury and double jeopardy were argued before the Appellate Division. That court indicated that the fair hearing question before the Grand Jury was not germane to this case (179). With regard to double jeopardy they stated:

"There is no merit in the claim by respondents Colombo and Albert Gallo that these indictments placed them twice in jeopardy for the same acts..."(180).[2]

On July 7, 1969 permission was granted appellant Joseph Colombo by Chief Judge Fuld to appeal to the Court of Appeals pursuant to Section 520 of the Code of Criminal Procedure.

The cause was heard by the Court of Appeals of the State of New York and Petitioner, Joseph Colombo argued that he was unfairly indicted due to the fact that the Grand Jury should have heard or been apprised of all the facts and circumstances regarding his desire to testify. He further emphasized that he was being placed in double jeopardy by being forced to be placed on trial for a crime that he was already convicted and sentenced for. (Refering to *Koota v.*

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[2]Decision as two defendants Gallo and Colombo—Gallo is not petitioning this Court.

Colombo, 17 N.Y. 2d 147 cert den'd. 384 U.S. 1001—affirming Judge Barshay's Order of December 16, 1965.

On October 30, 1969, the New York Court of Appeals affirmed the order of the Appellate Division of the Supreme Court, Second Department. *People v. Colombo*, 25 N.Y. 2d 641, 306 N.Y.S.2d 258 (memo opinion) (See Appendix F)

Petitioner, Joseph Colombo, made a timely motion for reargument urging upon the New York Court of Appeals that the matter of *Waller v. Florida*, 397 U.S. 387 (Dec'd April 6, 1970), 25 L.Ed. 2d 435, 38 L.W. 4263 had not been decided by this Court and requested the New York Court of Appeals to reconsider its original decision or at least wait until the Supreme Court of the United States decided the aforementioned *Waller* case, due to its double jeopardy ramifications. The Court denied this request, and on February 26, 1970, the Court of Appeals denied the motion for reargument and amended its remittur by adding the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether the rights of defendant under the Fifth and Fourteenth Amendments were denied. Defendant argued that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense. The Court of Appeals considered his contention and held that there was no violation of the defendant's constitutional rights." (See Appendix A)

A timely petition for a writ of certiorari was brought before this Court. On October 19, 1970 this court (per curiam) granted the petition for a writ of certiorari; vacated

the judgement and remanded this matter to the Court of Appeals of New York for reconsideration (see Appendix C). Nevertheless, on June 10, 1971 the Court of Appeals of New York reaffirmed their earlier determination (see Appendix B).

REASONS FOR GRANTING THE WRIT

Successive Prosecutions of the Same Defendant Arising Out of the Same Conduct Violates the Constitutional Guarantee Against Double Jeopardy.

The Fifth Amendment to the Constitution of the United States provides, in language virtually identical with that of the New York State Constitution.[3]

"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;***"

Under that provision it is plain that Section 602 of the former New York Penal Law would be unconstitutional if applied here—since it recites on its face that additional punishment for the identical act is not only proper but indeed desirable and necessary. Actually, nothing could be plainer than that this is precisely what is intended.

The Supreme Court has construed the protection as

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[3]Article I, Section 6, of the Constitution of the State of New York provides that:

"No person shall be subject to betwice put in jeopardy for the same offense."

applicable to both felonies and misdemeanors. *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

In *Helvering v. Mitchell*, 303 U.S. 391, a unanimous Supreme Court, speaking through Mr. Justice Brandeis, said (pp. 397-398, 399):

> "That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled.
>
> * * * Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction.
>
> * * *
>
> "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."

In *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed. 2d 797, 89 S.Ct. 2056, decided June 16, 1969, the Supreme Court held that the Fifth Amendment guarantee is enforceable against the States through the Fourteenth Amendment, overruling *Palko v. Connecticut*, 302 U.S. 319. (1937).

Appellant here has been punished for his crime. He is not offering to repay "that which he stole",[4] but on the contrary he offered to testify again and again before a Grand Jury and to answer questions which the District Attorney stated was necessary for its investigation. However, the District Attorney it is submitted was and is more interested in punishment than information.

The scope of the guaranty against double jeopardy has been so recently and so thoroughly discussed that extended discussion is not necessary. *Waller v. Florida*, 38 L.W. 4263, *supra*; *Benton v. Maryland*, *supra*. Tested by those criteria, it is plain that the indictment in the case at bar involves double jeopardy.

First, it is plain from the very language of the statute that it contemplates both a second trial as well as additional punishment for the precise offense.

Sections 601 and 602 of the Penal Law provide as follows:

"§ 601. *Punishment for criminal contempt.*

"A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court.

"§ 602. *Indictment for contempt.*

"Punishment for a contempt, as prescribed in Article Nineteen of the Judiciary Law, does not bar an indictment

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[4]Quoting from Respondent's Brief in the court below.

for the same offense; but where a person who has been so punished is convicted on such an indictment the court, in sentencing him, must take into consideration the previous punishment."

Article 19 of the Judiciary Law is entitled "Contempts." Its first section is § 750, *Power of courts to punish for criminal contempts*, which in pertinent part provides:

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others: ***

"3. Wilful disobedience to its lawful mandate."

In the previous proceeding, *Matter of Koota v. Colombo*, 17 N.Y.2d 147, certiorari denied, 384 U.S. 1001, the present respondent was punished pursuant to § 750(A) (3) of the Judiciary Law.

Thus here the appellant would not simply be retried for the same act. He would be placed in jeopardy for the identical offense, namely, willful disobedience of the court's order to testify before the Grand Jury.

The proof in this case would be identical with the proof in the earlier case.

No independent, separate, or distinct element would be involved in the proof of the present indictment; every element involved in the crime of contempt now alleged was similarly involved in the contempt for which the respondent was earlier tried and earlier convicted.

And trial on the present indictment for contempt would be had in the same tribunal that had earlier convicted this appellant for the identical contempt, namely, the Supreme Court of the State of New York for Kings County.

It is thus plain that the present indictment involves double jeopardy under the tests discussed and applied in *Waller v. Florida, supra; Benton v. Maryland, supra.* Petitioner submits, on the strength of these recent complete discussions that the present indictment subjects him to double jeopardy in violation of the Fifth Amendment of the Constitution of the United States.

In *Waller v. Florida, supra,* the Court considered whether the defendant could be twice placed on trial for the same alleged crime. In a majority opinion, Chief Justice Burger stated: "...Petitioner could not lawfully be tried both by the municipal government and State of Florida. In this context a 'dual sovereignty' theory is an anachronism, and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution." (at page 4265)

In the case at bar, the petitioner was adjudged guilty of the crime of criminal contempt and sentenced by a Justice of the Supreme Court, Kings County.

Presently, the District Attorney desires to prosecute the petitioner once again for what he concedes was the same transaction and in fact; the same crime in the same Supreme Court, Kings County.

The Court of Appeals of New York refers to a

criminal—civil contempt dichotomy.

The defendant was never able to purge himself — he was sentenced to 30 days and prior to his sentence, asked to testify. This was denied.

The cases cited by the Court of Appeals, 29 N.Y.2d 1, discuss civil contempt and refer to a coercive or remedial effect on the witness, causing him to answer questions. In this matter, the petitioner was *sentenced* to 30 days without the right to purge himself. (See Appendix K). In fact, prior to beginning his sentence, (pursuant to Judge Barshay's order), the defendant indicated that he desired to go before the Grand Jury and purge himself (55). This specific request was denied by Judge Barshay (56). Defendant was imprisoned for 30 days and paid the fine of $250.00. He was then indicted for the same matter (See Appendix L).

Obviously, the respondent is attempting to bring the petitioner to trial for the *same crime* and in the *same court*. The double jeopardy clause bars a second trial since all the charges grew out of the same criminal episode.

Joseph Colombo was adjudged in *Criminal Contempt* and was given a specific sentence of 30 days imprisonment plus a $250.00 fine without the right to purge himself. *Koota v. Colombo*, 17 N.Y. 2d 147, cert. den'd., 384 U.S. 1001 affirming Judge Barshay's order of December 15, 1965.

He was then indicted for the same act of *Criminal Contempt*. (Appendix L).

Therefore, the aforementioned judgment below should be reversed, with instructions to dismiss the indictment.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions to dismiss the indictment.

Respectfully submitted,

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September 7, 1971

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Appendices

Page

Appendix A - Remitur A-1

Appendix B - Opinion of the Court of Appeals B-1

Appendix C - Supreme Court of the United States—Journal of Proceedings C-1

Appendix D - Decision of the Court of Appeals Denying the Motion for Reargument and Amending the Remittur D-1

Appendix E - Opinion of the Court of Appeals E-1

Appendix F - Memoranda of Court of Appeals F-1

Appendix G - Opinion of Appellate Division G-1

Appendix H - Opinion Court of Appeals H-1

Appendix I - Order Granting Motion to Dismiss Indictment — Peo. v. Joseph Colombo I-1

Appendix J - Opinion Court of Appeals J-1

Appendix K - Order of the Supreme Court, Kings County, in the First Matter Entitled Koota vs. Colombo K-1

Appendix L - Indictment (Peo. v. Joseph Colombo) L-1

APPENDIX A
REMITTITUR

Copy of amended remittitur:

Remit. No. 2837
Ind. No. 2807/66 (Col)
2809/66 (Gallo)
App. No. 7301 (Col)
7305 (Gallo)

COURT OF APPEALS

State of New York, ss:

P L E A S in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of October in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

Remittitur ***October 30,*** ***1969***

The People &c.,

Respondent,

vs.

Joseph Colombo,

Appellant.

(and another title People v. Gallo).

Be it Remembered, That on the 15th day of September in the year of our Lord one thousand nine hundred and sixty-nine Joseph Colombo and Albert Gallo, the appellants in this cause, came here unto the Court of Appeals, by Slotnick & Narral and Price & Jovine, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent - in said cause, afterwards appeared in said Court of Appeals by Eugene Gold, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Jacob Kossman, admitted pro hac vice, of counsel for the appellants, and by

Mr. Irving P. Seidman, of counsel for the respondent-, and after

due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. And thereafter, on February 26, 1970, a motion by the defendant Colombo for reargument and for a stay having been denied and the motion insofar as it sought an amendment of the remittitur having been granted, this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of defendant under the Fifth and Fourteenth Amendments were denied. Defendant argued that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense. The Court of Appeals considered this contention and held that there was no violation of defendant's constitutional rights.

And thereafter on remand from the Supreme Court of the United States as to the defendant Colombo, this cause having been reargued by Mr. Barry Ivan Slotnick, of counsel for the appellant, and by Mr. Ronald M. Kleinberg, of counsel for the respondent, this Court did order and adjudge that upon reargument the decision of October 30, 1969 is adhered to.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New

York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ Raymond J. Cannon

Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,

Albany, October 30, 1969.

[Seal of the Court of Appeals of the State of New York]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ Raymond J. Cannon

Clerk

Jasen, J. This case, before us upon remand from the Supreme Court of the United States (400 U. S. 16), raises the issue of whether *Waller v. Florida* (397 U. S. 387), prohibits defendant's conviction for criminal contempt (former Penal Law, § 600, subd. 6) for failure to testify before a Kings County Grand Jury after he had previously been cited for judicial contempt (Judiciary Law, § 750, subd. A, par. 3) for disobeying a court order to testify before that same Grand Jury.

Defendant was called to testify before a Kings County Grand Jury investigating the use of legitimate business enterprises as a cover for various criminal activities. He thereupon refused to testify and continued to maintain his silence after being granted full immunity. Defendant was then taken before a Supreme Court Justice and ordered to return before the Grand Jury and testify. After his subsequent refusal to obey the mandate of the court, defendant was adjudged in contempt of court, pursuant to section 750 (subd. A, par. 3) of the Judiciary Law. Our court ultimately affirmed that conviction and defendant served a 30-day jail sentence therefor. (*Matter of Koota v. Colombo*, 17 N Y 2d 147, cert. den. 384 U. S. 1001.)

Thereafter, on October 10, 1966, appellant was indicted for criminal contempt, in violation of section 600 (subd. 6) of the former Penal Law, for failure to testify before the Grand Jury. On his original appeal, appellant argued that this subsequent indictment for criminal contempt, after being previously convicted of judicial contempt, violated the constitutional prohibition against twice being placed in jeopardy for the same offense. We rejected that contention (25 N Y 2d 641) upon the authority of *People v. Costello* (21 N Y 2d 367) and section 602 of the former Penal Law, which stated: "Punishment for a contempt, as prescribed in article nineteen of the judiciary law, does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment."

However, the Supreme Court remanded this case to us to reconsider in light of *Waller v. Florida* (397 U. S. 387), decided subsequent to our earlier decision. We conclude that the *Waller*

case does not affect our holding and that we should adhere to our original decision.

In *Waller*, the petitioner was one of a number of persons who removed a canvas mural from the City Hall of St. Petersburg, Florida, and carried it through the streets. For this escapade, he was charged by the City of St. Petersburg with destruction of city property and disorderly breach of the peace. He was found guilty on both counts in the municipal court and sentenced to 180 days' imprisonment. Thereafter, petitioner was charged by information by the State of Florida with grand larceny. It was conceded that this information was based upon the same acts as the violation of the two city ordinances. The Supreme Court held that this second prosecution constituted double jeopardy violative of the Fifth and Fourteenth Amendments, specifically holding: "'[I]f a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would . . . be a bar to the prosecution of such person in the proper state court.'" (397 U. S., at p. 396.)

Waller is inapplicable to the facts of this case for several reasons. In our view, the holding in *Waller* can only mean that a person cannot be tried by the State after previously being convicted for the same acts by a municipality. There is no such State-municipal dichotomy involved in the instant case. The essential meaning of the *Waller* case is an abolition of the old fiction that the State and its municipalities are really separate entities who may punish a person twice for the same crime. That case merely recognizes that a municipality is but an arm of the State when meting out criminal punishment.

A further distinguishing factor arises from the fact that *Waller* involved two separate punishments for the same act. In the present case, however, two distinct acts are being punished — refusal to testify before the Grand Jury and a separate refusal to obey the lawful mandate of a Supreme Court Justice. Each act, by itself, could properly be the subject of punishment. For instance, if defendant had belatedly obeyed a court order to return to the Grand Jury and testify, he still could conceivably be prosecuted for his initial wrongful refusal to testify before the Grand Jury.

Moreover, it must be noted that the punishment under the Penal Law and the citation for contempt of court (under the Judiciary Law) are designed to serve different purposes. The former protects the interest of the State to obtain evidence which will benefit the community as a whole, while the latter serves to protect the integrity and vindicate the power of our courts. Consequently, we are faced with separate acts, meriting separate punishment, for distinct purposes—a far different situation from *Waller* where there was multiple punishment for the same act.

It should also be noted that the prior commitment to civil jail, pursuant to section 750 of the Judiciary Law, was not the result of a criminal prosecution. This former proceeding was civil in nature and, hence, the doctrine of former jeopardy is not applicable. (See *Matter of Second Additional Grand Jury of County of Kings* v. *Cirillo*, 16 A D 2d 605, 607, affd. 12 N Y 2d 206.)

The Supreme Court has also consistently distinguished between the two types of contempt sentences that are present here. (*Shillitani* v. *United States*, 384 U. S. 364, 369; *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418, 441.) In the non-criminal adjudication of contempt, imprisonment "is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do." (*Gompers* v. *Buck Stove & Range Co.*, *supra*, at p. 442.) Likewise, commitment pursuant to section 750 of the Judiciary Law "is remedial and coercive, and the recalcitrant witness holds the key to his freedom." (*People ex rel. Valenti* v. *McCloskey*, 6 N Y 2d 390, 399.) By contrast, punishment for the "crime" of contempt is designated to vindicate the authority of the offended agency. (*Gompers* v. *Buck Stove & Range Co.*, *supra*, at p. 443.) Thus, the two contempts are basically of a differing character. Judicial contempt, punished by a remedial and coercive sentence, is not considered a crime in the constitutional sense. Hence, it may be punished without grand jury indictment or jury trial. (*Shillitani* v. *United States*, *supra*; *Levine* v. *United States*, 362 U. S. 610, 615–617.)

Indeed, the Supreme Court has apparently sanctioned the very procedure followed in the instant case:

> "Though there was but one contempt, imposition of the civil sentence for the refusals of June 26 is no bar-

rior to criminal punishment for the refusals of June 30. The civil and criminal sentences served distinct purposes, the one coercive, the other punitive and deterrent; that the same act may give rise to these distinct sanctions presents no double jeopardy problem. *Rex Trailer Co. v. United States*, 350 U. S. 148, 150 (1956); *United States v. United Mine Workers*, 330 U. S. 258, 299 (1947). [Footnote omitted.] Clearly, if the civil and criminal sentences could have been imposed simultaneously by the court on June 25, as the *United Mine Workers* case holds, it scarcely can be argued that the court's failure to invoke the criminal sanction until June 30 was fatal to its criminal contempt powers. Indeed, the more salutary procedure would appear to be that a court should first apply coercive remedies in an effort to persuade a party to obey its orders, and only make use of the more drastic criminal sanctions when the disobedience continues." (*Yates v. United States*, 355 U. S. 66, 74-75.)

In sum, the defendant was not placed in double jeopardy since the contempt provision of the Judiciary Law and the Penal Law require separate acts and have a different basis and purpose, thereby rendering the decision in *Waller* inapplicable. Accordingly, we adhere to our original decision of affirmance dated October 30, 1969.

Chief Judge FULD and Judges BURKE, SCILEPPI, BERGAN, BREITEL and GIBSON concur.

Upon reargument: Decision of October 30, 1969 adhered to.

Appendix C-Supreme Court of the United States-Journal of Proceedings

JOURNAL OF PROCEEDINGS

The following verbatim excerpts from the Journal of Proceedings of October 19 include all criminal matters acted upon by the Court.

COLOMBO v. NEW YORK on petition for writ of certiorari to the Court of Appeals of New York. No. 175. Decided October 19, 1970.

Per Curiam.

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the Court of Appeals of New York for further consideration in light of Waller v. Florida, 397 U.S. 387.

Mr. JUSTICE BLACK is of the opinion that certiorari should be granted and the judgment reversed.

8 CrL 4023

APPENDIX D

Decision of the Court of Appeals denying the Motion for Reargument and Amending the Remittitur

Mo. No. 107

The People &c.,

Respondent,

vs.

Joseph Colombo,

Appellant.

DECISION COURT OF APPEALS FEB 26 1970

Motion for reargument denied.

Motion to amend the remittitur granted, return of remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of defendant under the Fifth and Fourteenth Amendments were denied. Defendant argued that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense. The Court of Appeals considered this contention and held that there was no violation of defendant's constitutional rights.

Motion for a stay denied.

APPENDIX E

Opinion of the Court of Appeals

No. 425.

The People &c.,
Respondent,

vs.

Joseph Colombo,
Appellant.

(and another title People v. Gallo).

Order affirmed.

No opinion.

All concur.

APPENDIX F

Memoranda of Court of Appeals

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOSEPH COLOMBO, Appellant.

Argued October 9, 1969; decided October 30, 1969.

***People v. Colombo*, 32 A D 2d 812, affirmed.**

Appeals, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 16, 1969, which (1) reversed, on the law and the facts, two orders of the Supreme Court (Vincent D. Damiani, J.), entered in Kings County, granting motions to dismiss two indictments charging defendants, respectively, with criminal contempt of court in violation of subdivision 6 of section 600 of the former Penal Law and (2) denied said motions. On December 15, 1965, each defendant had been adjudged to be in criminal contempt of court pursuant to paragraph 3 of subdivision A of section 750 of the Judiciary Law for his refusal, on the advice of counsel, to obey an order of the Supreme Court to answer questions propounded to them by the Regular April 1964 Kings County Grand Jury, despite a grant of full immunity, and that each was subsequently imprisoned for 30 days and paid a fine of $250. The Grand Jury returned the subject indictments against defendants on October 10, 1966. Defendants offered to go before the Grand Jury and testify on May 9, 1968, when a stay of execution of the prior imprisonment and fine expired. Defendants were not called to testify although, on October 20, 1965, the District Attorney had stated that they could testify at any time and that, in that

event, proceedings against them would be dropped automatically. The Appellate Division stated that the evidence before the Grand Jury, if unexplained or uncontradicted, would warrant a conviction for a violation of section 600 (subd. 6) of the former Penal Law. In the Court of Appeals defendants argued that the District Attorney should have informed the Grand Jury that defendants had been willing to testify, and that the failure to do so was sufficient reason for dismissal of the indictments based on defendants' refusal to testify on December 15, 1965; and that successive prosecutions of the same defendants arising out of the same conduct violated the State and Federal prohibitions against double jeopardy. The People argued that the October 20, 1965 offer by the District Attorney to drop contempt charges against defendants if they subsequently testified was limited by later proceedings to December 15, 1965; that the crime charged in the indictment was completed on that date when appellants refused to return to the Grand Jury to answer questions, and that defendants were not placed in double jeopardy since the contempt provisions of the Judiciary Law and the Penal Law were substantially different, each was intended to correct a distinct factual situation, and the Legislature, in section 602 of the former Penal Law, specifically stated that punishment under the Judiciary Law did not bar a later indictment under the Penal Law.

Jacob Kossman and *Barry Ivan Slotnick* for appellants.

Eugene Gold, District Attorney (Irving P. Saidman and *Jay Gregory Horlick* of counsel), for respondent.

Order affirmed; no opinion.

Concur: Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Breitel, Jasen and Gibson.

APPENDIX G

Opinion of Appellate Division

People, &C., ap, v. Joseph Colombo, res; People, & c., ap, v. Lawrence Gallo, res; People, &c., ap., v. Albert Gallo, res—Appeals from three orders of the Supreme Court, Kings County, each of which respectively granted a separate motion by each defendant, to dismiss an indictment against him for criminal contempt of court, the order as to defendant Colombo being dated Aug. 22, 1967, and the orders as to the other defendants being dated July 28, 1967.

Appeal from the order which granted the motion of defendant Lawrence Gallo, now deceased, dismissed *(People v. Mintz*, 20 N.Y. 2d 753).

Orders which granted the motions of defendants Joseph Colombo and Albert Gallo reversed, on the law and the facts, and motions denied.

In our opinion, the evidence before the grand jury would, if unexplained or uncontradicted, warrant a conviction for violation of subdivision 6 of section 600 of the Penal Law of 1909 (Code Crim. Pro., sec. 251). That the refusal to testify was made on advice of counsel and in a pleasant manner is of little relevance (cf. *People v. Woodruff*, 26 A.D. 2d 238, 238-239; *People v. Zweig*, A.D. 2d [dec. April 28, 1969]; *Matter of Koota v. Colombo*, 17 N.Y. 2d 147, 151).

We also think that the stipulation of the district attorney, made on Oct. 20, 1965, with reference to dropping proceedings against defendants willing to testify before the grand jury, was reasonably limited in time to Dec. 15, 1965, by the district attorney at the hearing on Dec. 7, 1965. It is obvious from the

conduct of the court and the parties on May 9, 1966, that neither the court nor they considered the Oct. 20 stipulation to be still in effect.

There is no merit in the claim by respondents Colombo and Albert Gallo that their indictments place them twice in jeopardy for the same acts (*Matter of Marangelo v. Criminal Court of City of New York*, 49 Misc. 2d 414; *People v. Cassello*, 21 N.Y. 2d 987; *People ex rel. Maurer v. Jackson*, 2 N. Y. 2d 259, 264).

APPENDIX H

Opinion of the Supreme Court, Kings County.

Memorandum by Damiani, J.

SUPREME COURT

Kings County

(Criminal Term, Part I)

Dated July 20, 1967

Ind. No. 2807/66

People of the State of New York

vs.

Joseph Colombo

Ind. No. 2808/66

People of the State of New York

vs.

Lawrence Gallo

Ind. No. 2809/65

People of the State of New York

vs.

Albert Gallo

The defendants have been indicted in a one-count indictment charging Criminal Contempt of Court in violation of Penal Law Section 600, subd. 5, for their alleged "contumacious and unlawful refusal, after being duly sworn" as witnesses, "to answer legal and proper interrogatories".

They now move for (1) a bill of particulars, (2) permission to enter a plea of "former judgment of conviction" pursuant to Code of Criminal Procedure, Section 332, and (3) an inspection of the Grand Jury minutes and a dismissal of the indictment.

On oral argument, the People consent to the first two parts of the motion, i.e., to furnish defendants with a bill of particulars, and the district attorney stated for the record that defendants' plea of not guilty "encompasses the plea of former jeopardy and double jeopardy".

The People, however, oppose the third part of the motion which seeks a dismissal of the indictment on the grounds of (1) former jeopardy, and (2) insufficiency of the grand jury minutes for the finding of an indictment.

The facts as to what transpired in the proceedings prior to the instant indictment are not in dispute and may be stated as follows:

The Regular April 1964 Grand Jury has been conducting an investigation, since September 1965, into an alleged organized criminal conspiracy to commit bribery, extortion, usury and other crimes in the County of Kings, and to use certain legitimate business enterprises as a cover for monies obtained from said criminal activities.

The defendants were subpoenaed to testify before the Grand Jury on October 14, 1965 and, upon the advice of counsel, the defendants Gallo asserted their Federal and State privilege against self-incrimination and all three defendants challenged the propriety, relevancy and materiality of the Grand Jury's investigation and the questions propounded to them.

The Grand Jury thereupon granted each defendant immunity pursuant to Penal Law, Section 2447, but the defendants continued to press the legal grounds previously asserted in refusing to testify.

On October 20, 1965, the District Attorney applied to the Justice presiding in Criminal Term Part I of this Court (hereinafter referred to as the "Presiding Justice") for a direction to each of the defendants to return to the Grand Jury and answer the questions propounded.

Section 750 of the Judiciary Law provides:

> "A court of record has power to punish for criminal contempt, a person guilty of any of the following acts * * *

5. Contumacious and unlawful refusal * * *, after being sworn, to answer any legal and proper interrogatory."

Section 755 of the Judiciary Law provides:

"When punishment may be summary: Where the offense is committed in the immediate view and presence of the court * * * upon a trial or hearing, it may be punished summarily. * * *."

After hearing argument and receiving briefs, the Presiding Justice directed the parties to appear on December 7, 1965, at which time the defendants were directed to return to the Grand Jury room and answer the said questions. The defendants adhered to their original position and refused to answer on the legal grounds previously asserted. They were thereupon adjudged to be in Criminal Contempt of Court pursuant to Section 750 of the Judiciary Law and each defendant was sentenced to 30 days in the Civil Prison of the City of New York and fined $250. The commitment orders were signed on December 15, 1965 and were reviewed and sustained by our appellate courts and certiorari was denied by the Supreme Court of the United States (*Matter of Kosta v. Colombo*, 50 Misc. 2d 583; 25 A.D. 2d 497; 17 N.Y. 2d 147; and cert. den. 384 U.S. 1001.)

While the petition for a writ of certiorari was pending in the United States Supreme Court, the stays of execution of the commitment orders granted by the appellate courts expired and on May 9, 1966, the Presiding Justice refused defendants a further stay. The defendants then offered to go before the grand jury and testify but, upon the refusal of the District Attorney to permit them to do so, the Presiding Justice ordered the defendants committed and each defendant has served the

[illegible] jail sentence and paid the $250 fine.

Without the defendants being called before the Grand Jury again concerning this investigation and despite their willingness to testify, the instant indictments were filed on October 10, 1966 charging them with Criminal Contempt of Court contrary to Penal Law, Section 600, subd. 2. That section provides as follows:

"Section 600. Criminal Contempt.

A person who commits a contempt of court of any one of the following kinds, is guilty of a misdemeanor:

2. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory;"

As conceded by the District Attorney on oral argument, and confirmed by an examination of the Grand Jury minutes, these indictments are based on the defendants' original refusal on December 7, 1965, to appear before the Grand Jury and answer questions for which they were adjudged in contempt of court on December 15, 1965 pursuant to Section 750 of the Judiciary Law and for which they have served a jail sentence and paid a fine.

It is the defendants' contention that their punishment for contempt, both summarily pursuant to Section 750 of the Judiciary Law, and by indictment under Section 600, subd. 2 of the Penal Law, for the single refusal on December 7, 1965, to obey the court's direction to answer the questions propounded by the Grand Jury, constitutes double jeopardy in violation of the Fifth Amendment to the Federal Constitution and Article 1, Section 6 of our State Constitution.

Defendants also contend that the present indictment is barred as a matter of statutory law by Section 1938 of the Penal Law, which provides as follows:

"Section 1938. Punishment when different penalties are provided by different provisions of law.

An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

The District Attorney, on the other hand, contends that defendants' constitutional rights against double jeopardy are not violated and that Sections 601 and 602 of the Penal Law specifically permit the procedure followed in this case of indicting a defendant for the same offense for which he may have been previously punished as a contempt.

Penal Law, sections 601 and 602 provide:

"Section 601. Punishment for criminal contempt.

A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court."

"Section 602. Indictment for contempt.

Punishment for contempt, as prescribed in article nineteen of the judiciary law, does not bar an indictment for the same offense; but when a person

who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment."

The defendants urge that Sections 601 and 602 are unconstitutional or, in any event, are superseded by Section 1938 of the Penal Law, *supra*, which was enacted in 1881, many years after Sections 601 and 602, which go back to the Revised Statutes.

The District Attorney argues that there is ample authority sustaining Sections 601 and 602 on the theory that a criminal contempt committed in the presence of the court simultaneously constitutes (1) an affront to the *dignity of the court* for which a person is punishable under the Judiciary Law; and (2) an offense against the *People of the State*, i.e., refusal to answer questions of the *Grand Jury* for which he is punishable under Section 600 of the Penal Law. However, in *People ex rel. Sherwin v. Mead*, (92 N.Y. 415) (1883), where the above distinction was recognized, the constitutional question of double jeopardy was not raised and, admittedly, in many of the cases cited by the District Attorney, said proposition is *dicta*.

It is to be noted that in the case most closely in point, relied upon by the People on the issue of double jeopardy, Judge Keating has very recently granted leave to appeal to the Court of Appeals. In *Matter of Marangelo v. Criminal Court of the City of New York*, (49 Misc. 2d 414) the District Attorney's position was sustained by Mr. Justice Capozzoli, then sitting in Special Term in an Article 78 proceeding. Marangelo's conviction in the Criminal Court of the City of New York was subsequently affirmed by the Appellate Term, First Department without opinion (N.Y.L.J., 6/16/67, p. 16, col. 6) and leave to appeal to the Court of Appeals has since been granted as stated above.

In my judgment, however, it becomes unnecessary to decide the question of double jeopardy in view of the particular facts in this case. After reviewing the Grand Jury minutes, it is my opinion that they fail to establish that the defendants' refusal to answer the Grand Jury's questions was contumacious and willful. Even if it be assumed that the minutes are sufficient on their face, in fairness to the defendants, the indictment should be dismissed and the case resubmitted to the Grand Jury so that the minutes of all the proceedings before the Presiding Justice may be submitted to it and that it may be made aware of all the facts concerning the defendants' conduct herein.

"There can be no doubt that an important and necessary element of criminal contempt is an intent to defy the dignity and authority of the court (*People v. Post Standard Co.*, 13 N.Y.2d 185 at pp. 189-191, and cases cited). The proof of that element is insufficient on this record, or, in any event, was not fully submitted to the Grand Jury, as will be illustrated below.

Throughout the hearings of October 20, 1965 and December 7, 1965 before the Presiding Justice, the District Attorney repeatedly and emphatically stated it was not his purpose or desire to punish the defendants for contempt, but rather to obtain their testimony before the Grand Jury. (Grand Jury Exh. No. 2, pp. 55, 70, 79-80.)

It was also made clear in the minutes that the defendants were not defiant or recalcitrant but that they were acting on the advice of counsel and were respectfully basing their refusal to answer on issues of law rightfully and reasonably asserted. For example, the following colloquy appears in the minutes of December 7, 1965:

"Mr. Sonenshine: May I add this, if the Court

please? I am sorry to interrupt, but I just want to make something clear because I can see the direction that this is taking. There are refusals of many kinds. There are those with regard to absolute refusals of an almost violent or vituperative nature, that is one kind of refusal. There is another kind because of a principle involved which is a respectful refusal and not based upon any fist-shaking defiance. I want this record clear that so far as my clients are concerned, that they will not answer questions is not based upon any so-called fist-shaking defiance as may be depicted or sought to be depicted but is simply an argument based upon a question of right or reason. Your Honor has thus far ruled against us and, of course, at this moment we are bound by that ruling. But in the event that the future should determine that the ruling should be otherwise I want it clearly understood that this is not a matter of jousting with or fighting with or disputing with the Court anything other than the issue of law involved.

The Court: I don't think anyone even suggested it.

Mr. Sonenshine: If it hasn't been suggested, I wanted to make sure it was not.

The Court: I believe that each witness is taking—is taking the advise of his counsel.

Mr. Sonenshine: I am sure of that.

The Court: And each counsel has advised his client with respect to his view of the law. It happens to be in disagreement with the Court's.

Mr. Sonenshine: Very well, your Honor."

(Grand Jury Exh. No. 2 p. 78.)

In fact, on October 20, 1965 the following stipulation was entered on the record:

"Mr. Sonenshine: May I say this, your Honor, for the sake of some expediency here? May I ask that all of the stipulations that we are making now, that they were deemed to have been directed and they refused, be nonetheless subject at a later time, should any witness, whoever it may be, decide to want to testify, that he will be permitted to without consequence should he so change his mind?

Mr. Koota: If any witness wants to testify *at any time*, I will be happy to have him.

The Court: Proceedings against him will be dropped.

Mr. Koota: Automatically."

(Grand Jury Exh. No. 2 p. 61.) (Emphasis supplied)

On May 9, 1966 while defendants' petition for a writ of certiorari was pending before the United States Supreme Court all appellate court stays of their commitment orders expired and the defendants surrendered themselves to the court and on the denial of any further stay, immediately offered to return to the Grand Jury and testify.

However, the minutes of the proceedings of May 9, 1966 were not submitted to the Grand Jury that returned the instant indictments on October 10, 1967 and it does not appear that said Grand Jury was aware of defendants' offer to testify.

The District Attorney apparently acted in good faith in not submitting the May 9th minutes because it appears to be his position that the defendants' contempt was complete on December 15, 1965 after the Presiding Justice ruled against the defendants and they refused to return to the Grand Jury and answer the propounded questions.

Nevertheless, in view of the fact that the defendants had reason to believe that the District Attorney was more interested in their testimony before the Grand Jury than in punishing them for contempt and that a formal stipulation had been entered on the record to the effect that they would be permitted to testify "at any time" during the pendency of the contempt proceedings against them and that said proceedings would be "dropped automatically," what transpired on May 9, 1966 was competent, material and relevant to the issue of defendants' intent or wilfulness in not answering on December 7, 1965. The defendants were entitled to have the Grand Jury apprised of their offer to cooperate on May 9, 1966 and to consider whether their conduct in refusing to answer on December 7, 1965 was justified and within the contemplation of the parties under the stipulation of October 20, 1965.

While it is true that the transcript of the hearings of October 20, 1965 and December 7, 1965 were introduced into evidence before the Grand Jury, it does not appear that the stipulation contained therein concerning the dropping of the proceedings against a witness who wished to testify was called to the attention of the Grand Jury. Even if it was, the Grand Jury could give it no consideration or effect if it was not apprised of defendants' subsequent willingness to cooperate in the investigation. The failure to call the stipulation to the Grand Jury's attention and the failure to apprise the Grand Jury of defendants' subsequent request to testify compel the conclusion that in fairness to the defendants the indictment should be dismissed and the matter resubmitted to the Grand Jury with a view to advising them of all the facts above set forth. It may well be, in view of the above circumstances, that the Grand Jury may not find that the defendants' refusal on December 7, 1965 was contumacious and unlawful within the meaning of Section 600, subdivision 5 of the Penal Law.

I daresay the District Attorney might be well advised to accept the offer of the defendants to testify and recall them before the Grand Jury. It is not claimed that the investigation has been thwarted by the refusal of these witnesses to cooperate earlier. Rather, the People's brief (p. 2) indicates that the April 1964 Grand Jury is still in existance and that this important investigation is continuing. Thus, the public interest may be better served by recalling these witnesses to testify rather than again punishing them for contempt for the single refusal of December 7, 1965, particularly in view of the serious questions of constitutional and statutory law involved. Moreover, the People cannot be prejudiced by recalling these witnesses for the reason that in the event that they should refuse to testify they could again be summarily punished for contempt on a record free from the serious questions presented here.

Accordingly, the indictments are dismissed. Submit order.

VINCENT DAMIANI
J. S. C.

APPENDIX I

Order Granting Motion to Dismiss Indictment

Pen. v. Joseph Colombo

In a Criminal Term, Part I, of the Supreme Court of the State of New York, Held in and for the County of Kings, at the Courthouse thereof, in the City of New York, on the 22 Day of August, 1967.

Present:

HONORABLE VINCENT A. DAMIANI,

Justice

No. 2807/66

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

—against—

JOSEPH COLOMBO,

Defendant.

The above-named defendant, having moved this court for an inspection of the Grand Jury minutes and an order dismissing the indictment herein, upon a ground that the

evidence before the Grand Jury was insufficient in law to warrant the finding of the said indictment, and the said motion having duly come on to be heard on the 28th day of April, 1967, and after hearing Barry Ivan Slotnick, Esq., by Jacob Kossman, Esq., attorney for the defendant, in support of said motion, and Irving Seidman, Assistant District Attorney of Kings County, in opposition thereto.

Now, upon reading and filing the order to show cause presented by the defendant and signed on the 7th day of April, 1967, and the affirmation in support thereto, duly affirmed by Barry Ivan Slotnick, Esq., on the 6th day of April, 1967, and upon all other briefs, papers and proceedings heretofore had herein, and due deliberation having been had thereon, and upon filing the opinion of the court, it is on motion of Barry Ivan Slotnick, Esq., attorney for the defendant,

ORDERED, that the motion to dismiss the indictment charging the above-named defendant with the crime of criminal contempt of court pursuant to Section 600, Subdivision 6 of the Penal Law, be, and the same hereby is, in all respects granted.

ENTER

VINCENT D. DAMIANI
Supreme Court Justice of Kings County

Granted
Aug 23 1967
ROBERT J. CREWS
Clerk

I-2

APPENDIX J

State of New York
Court of Appeals

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2. No. 86.
In the Matter of
the Application of Aaron E. Koota,
District Attorney, Kings County, &c.,
Respondent,
to punish Joseph Colombo, & ors.
Appellants. 66

OPINION

Unrevised and Uncorrected. Not for Publication.

FULD, J.:

The appellants, although granted the complete immunity provided for by section 2447 of the Penal Law, refused to testify before a Kings County Grand Jury and were adjudged guilty of criminal contempt (Judiciary Law, §750, subd. 3). The Appellate Division unanimously affirmed and this court granted leave to consider, primarily, two grounds urged by the appellants for reversal, namely, (1) that the testimony sought from them was not relevant to the inquiry being conducted by the grand jury and (2) that they were denied due process at the hearing accorded them.

It has long been the rule in New York that "there can be no punishment for contempt for • • • [refusing to testify before the grand jury] unless the court is shown that the evidence demanded may be relevant and proper". (*Matter of Spector v. Allen*, 281 N.Y. 251, 258; see *Matter of Manning v. Valente*, 272 App. Div. 358, affd. 297 N.Y. 681; *People v. Doe [Byk]*, 247 App. Div. 324, affd. 272 N.Y. 473; *Matter of Greenleaf v. Goldstein*, 176 Misc. 566, affd. 266 App. Div. 658, affd. 291 N.Y. 690.) However, although the court must be apprised of "the nature of the evidence demanded and of its relation to the subject of the investigation" (*Matter of Spector v. Allen*, 281 N.Y. 251, 258, *supra*), the relevancy of the questions need not be conclusively established. It is enough if the bearing [of the questions] on the subject of the investigation was susceptible of intelligent estimate" (*Matter of Spector v. Allen*, 281 N.Y. 251, 258, *supra*) or if there was a "justifiable suspicion that the former is related to the latter." (*People v. Doe [Byk]*, 247 App. Div. 324, 326, affd. 272 N.Y. 473, *supra*.)

Applying this test to the record before us, we find no basis for countenancing appellants' refusals to answer the questions put to them. The grand jury was and still is seeking to determine whether criminals have infiltrated into legitimate businesses in Kings County and are now using them as covers for further illicit activities. Far from being summoned "in a spirit of meddlesome inquiry" (*Hale v. Henkel*, 201 U.S. 43, 63; see *Hobson v. District Court*, 188 Iowa 1062), the appellants were subpoenaed to testify because, according to the district attorney, they are all associated, either directly or through each other, with two Kings County corporations that are among the enterprises under investigation. The relevancy of the testimony sought from these witnesses is, therefore, clearly "susceptible of intelligent estimate."

The appellants complain that they were subjected to "summary" treatment at trial, depriving them of due process by denying them an adequate opportunity to contest the propriety of the questions. However — whether or not the court could have acted summarily (see *People v. Hackley*, 24 N.Y. 74, 79-80) — the record establishes that the proceedings below were neither "summary" nor lacking in "due process". (See *People ex rel. Cirillo v. Warden*, 11 N Y 2d 51, 53.)

Section 751 of the Judiciary Law provides that, in other than summary proceedings, "the party charged [with contempt] must be notified of the accusation, and have a reasonable time to make a defense." Here, the appellants were afforded ample notice of the proceedings; they were represented by counsel, apprised of the relationship between their testimony and the purposes of the grand jury inquiry and given every opportunity to explain their contumacious behavior. Moreover, each lawyer was supplied with the grand jury minutes covering the appearance of his client and given permission to submit a brief after the proceedings were adjourned. Six weeks later, when the trial judge had given full and thorough consideration to the appellants' contentions, they were afforded additional opportunities to justify their silence or to purge themselves of contempt. At no time did they offer any evidence to support the charge that the district attorney was acting in bad faith. Manifestly, the appellants were accorded every procedural safeguard to which they were constitutionally entitled. (See *Matter of Ushkowitz*, 15 N Y 2d 713; *People ex rel. Cirillo v. Warden*, 11 N Y 2d 51, *supra*; see, also, *Murphy v. Waterfront Commissioner*, 378 U.S. 52.)

The recent case of *Harris v. United States* (382 U.S. 162), upon which the appellants rely, is not in point. There, a recalcitrant witness before a Federal grand jury was summarily convicted of contempt. The Supreme Court reversed in order to

permit precisely the type of hearing held in the present case (382 U.S., at pp. 165-167; see Fed. R. Crim. P. 52[b]).

We have considered the other arguments advanced by the petitioners and conclude that they too are without merit.

The orders of the Appellate Division should be affirmed.

• • • • • • • • • • • • • • • •

Orders affirmed. Opinion by Fuld, J. All concur.

APPENDIX K

Order of the Supreme Court, Kings County, in the First Matter Entitled Koota vs. Colombo

At a Criminal Term Part 1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof, Civic Center, Borough of Brooklyn, City of New York, on the 15th day of December, 1965.

PRESENT:
HON. HYMAN BARSHAY,
Justice

IN THE MATTER OF THE APPLICATION
OF
AARON E. KOOTA, DISTRICT ATTORNEY, KINGS COUNTY, ON BEHALF OF THE REGULAR APRIL 1964 GRAND JURY OF THE COUNTY OF KINGS, DULY HELD OVER TO PUNISH ALBERT GALLO, A WITNESS DULY CALLED BEFORE SAID GRAND JURY AS AND FOR A CRIMINAL CONTEMPT OF COURT PURSUANT TO THE PROVISIONS OF SECTION 619 OF THE CODE OF CRIMINAL PROCEDURE AND ARTICLE 19 OF THE JUDICIARY LAW

It appearing to the satisfaction of this Court that at the April 1964 Term of this Court, Part 1 thereof, a regular Grand Jury for the County of Kings and for this Court was duly impaneled, and that the said Term of the Court and of the said Grand Jury has been duly extended and that the said Grand Jury is now duly in existence;

And it further appearing to the satisfaction of this Court that the said Grand Jury was and is lawfully in session and was and is investigating to determine whether there existed in the County of Kings a criminal conspiracy amongst certain individuals to commit the crimes of conspiracy, bribery, corruption, coercion, extortion and usury in the County of Kings;

And it further appearing to the satisfaction of this Court that the Police Department of the City of New York, and the District Attorney of Kings County, have obtained information which alleges and indicates that certain witnesses called before the said Grand Jury were and are using certain real estate brokerage concerns located in Kings County as money lending institutions in violation of law, these real estate concerns being licensed by the State of New York to do business as real estate brokers. Further that the Grand Jury was and is seeking to determine whether or not these real estate broker licenses granted by the State of New York were and are now being used to cloak illegal money lending and illegal money transfers, and to circumvent the detection of the commission of the crimes of conspiracy, bribery, corruption, coercion, extortion and usury:

And it further appearing to the satisfaction of this Court that the Grand Jury was and is conducting an inquiry into the

purpose of a meeting held by certain witnesses herein at a resort hotel located in Sullivan County, State of New York;

And it further appearing to the satisfaction of this Court that the witness above named, ALBERT GALLO, duly appeared as a witness before the said Grand Jury and said investigation on the 14th day of October, 1965, and said witness was thereupon duly sworn to tell the truth;

And it further appearing that the said witness, ALBERT GALLO, had refused to answer any questions put to him before the said Grand Jury upon the ground that said answer might incriminate him;

And it further appearing to the satisfaction of this Court that thereupon in the form and manner provided by law, immunity from prosecution was duly conferred upon the said witness;

And it further appearing to the satisfaction of this Court that thereafter on the 14th day of October, 1965, the said witness reappeared before the said Grand Jury and that questions were propounded to the said witness, which said questions were pertinent relevant and material to the said investigation then and there being conducted before the said Grand Jury, among which questions were the following:

1. Mr. Gallo by whom are you employed?

2. Do you have any interest in any business ventures?

and that the said witness refused to answer said questions or any other pertinent or relevant question upon the ground that the answer might tend to incriminate him despite the fact that immunity had been duly conferred upon the said witness as hereinabove recited;

And it further appearing to the satisfaction of this Court that thereupon on the 20th day of October, 1965, at the request of the said Grand Jury, the District Attorney applied to this Court at Part 1 thereof before the undersigned for a direction overruling the objection of the said witness and ruling that the grant of immunity to the said witness was coextensive with his privilege against self incrimination with respect to any and all crimes, transactions, matters or things his testimony may disclose before the said Grand Jury, and that his refusal to answer said questions based upon said privilege against self incrimination was unwarranted in law, and further directing the said witness to answer the said questions before the said Grand Jury, and upon such application the said witness having appeared before the said Court in person and by his attorney, and the District Attorney of Kings County and said Grand Jury having appeared by AARON E. KOOTA, District Attorney, and IRVING P. SEIDMAN, Assistant District Attorney, and after hearing the said attorneys in support of their respective positions, and the Court on December 7, 1965 after due deliberation having overruled the claim of privilege against self incrimination of the said witness, and the Court thereupon in open Court having directed the said witness to return to the said Grand Jury to answer said questions, and the said witness having thereupon stated in open Court that he refused to obey the order, mandate and direction of the Court as herein recited, and that he refused to and would not answer said questions or any other questions before the said Grand Jury, and due deliberation having been had on all thereon,

NOW, on motion of AARON E. KOOTA, District Attorney of Kings County, it is ordered and adjudged that the said witness, ALBERT GALLO, by reason of the particular circumstances of his offense hereinabove set forth for his contumacious and unlawful refusal after being sworn as a

witness to answer any legal and proper interrogatories and for his wilful disobedience to the lawful mandate of this Court, committed a criminal contempt of court in the immediate view and presence of the Court and that said contempt was wilful and unlawful and in violation of Section 750 of the Judiciary Law of the State of New York;

And it is further ordered and adjudged that for the said criminal contempt of court, the said ALBERT GALLO be imprisoned in the Civil Prison of the City of New York for a term of thirty days and in addition thereto to pay a fine of $250, and in the event that the said ALBERT GALLO shall fail to pay the fine of $250 herein assessed against him, that he shall be imprisoned for a term of thirty days. Surrender stayed to 1/4/66 at 10 A.M.

ENTER

J.S.C.

APPENDIX L

Indictment
(Peo. v. Joseph Colombo)

SUPREME COURT OF THE STATE OF NEW YORK

Kings County

Ind. No. 2807-1966

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiffs,

against

JOSEPH COLOMBO

Defendant.

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of CRIMINAL CONTEMPT OF COURT contrary to Section 600, Subdivision 6 of the Penal Law for his contumacious and unlawful refusal, after being duly sworn as a witness, to answer legal and proper interrogatories.

AARON E. KOOTA
District Attorney
Kings County

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Supreme Court, U.S.
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OCT 12 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-352

JOSEPH COLOMBO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Statement	1
Jurisdiction	2
Statutes	2
Facts	5
ARGUMENT:	
POINT ONE—A conviction for contempt under the New York Judiciary Law Sec. 750 does not bar prosecution for criminal contempt under New York Penal Law Sec. 600. The double jeopardy clauses of the state and federal constitutions do not bar prosecution for one by reason of previous punishment for the other	9
POINT TWO—The decision in Waller v. Florida does not bar this prosecution of the Petitioner for criminal contempt	14
CONCLUSION	17

AUTHORITIES CITED

Cases

Abbate v. United States, 359 U.S. 187 (1959)	9
Downum v. United States, 372 U.S. 734 (1963)	9
Fireman's Fund Insurance Co. v. Myers, 439 F. 2d 834 (3rd Cir. 1971)	13

PAGE

Gompers v. Buck's Stove and Range Co. 221 U.S. 418 (1911) 11

Lewinson v. United States, 278 F. 2d 421 (7th Cir. 1921), cert. den. 258 U.S. 630 (1922) 13

Matter of Koota v. Colombo, 50 Misc. 2d 583, 25 A.D. 2d 497, 17 N.Y. 2d 147; and cert. den. 384 U.S. 1001 6

Matter of Second Additional Grand Jury of County of Kings v. Cirillo, 16 A.D. 2d 605 (2d Dept. 1962) affd. 12 N.Y. 2d 206 (1963) 10

Mirra v. United States, 220 F. Supp. 361 (S.D.N.Y. 1963) 14

People v. Colombo, 32 A.D. 2d 812 7

People v. Colombo, 25 N.Y. 2d 641, 306 N.Y.S. 2d 258 8

People v. Costello and Marangello, 21 N.Y. 2d 967 1968) 11

People v. Gallo, 32 A.D. 2d 812 7

People v. Meakin, 133 N.Y. 214 (1892) 10, 11

People ex rel. Sherwin v. Mead, 92 N.Y. 415 (1883) 10

Price v. Georgia, 398 U.S. 323 (1970) 9

Shillitani v. United States, 384 U.S. 364 (1966) 12

United States v. Dixon, 347 U.S. 381 (1954) 9

United States v. Jorn, 400 U.S. 470 (1971) 9

United States v. Mirra, 220 F. Supp. 361 (S.D.N.Y. 1963) 9

United States v. Rollerson, 308 F. Supp. 1014 (D.C. D.C. 1970) 14

Uphaus v. Wyman, 360 U.S. 72 (1959) 10

Waller v. Florida, 397 U.S. 387 (1970) 8, 14, 15, 16

Yates v. United States, 355 U.S. 66 (1957) 13

Statutes

PAGE

§ 28 U.S.C. 1257 (3) 2

United States Constitution

Fifth Amendment 2, 15

Fourteenth Amendment 2, 15

Former Penal Law of the State of New York

Section 600 ..... 2, 9, 10, 11
Section 601 2
Section 602 ..... 3, 10
Section 750 Judiciary Law of the State of New York 3, 9, 10, 11
Section 750 sub 3 6
Section 755 of the Judiciary Law of the State of New York 4
Section 1938 3
Section 2447 5

Miscellaneous

Volstead Act 13

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-352

JOSEPH COLOMBO,

Petitioner.

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari in order to review an order of the Court of Appeals of the State of New York entered June 10, 1971 which affirmed the order and judgment of the Court of Appeals decision of October 30, 1969 which affirmed the order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated June 16, 1969, which in turn reversed an order of the Supreme Court of the State of New York, Kings County, dated July 20, 1967, and entered August 22, 1967 which dismissed the indictment charging the defendant with the crime of Criminal Contempt of Court under Section 600, subdivision 6, of the former New York Penal Law.

Jurisdiction

The jurisdiction of this court is sought to be invoked under 28 U.S.C. 1257 (3). Petitioner contends he was denied his rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner argues that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense.

Statutes

The following are the applicable statutes:

Section 600 of the former Penal Law of the State of New York provides:

Criminal Contempt

"A person who commits a contempt of court of any one of the following kinds, is guilty of a misdemeanor; Subdivision 6-Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory."

Section 601 of the former Penal Law of the State of New York provides:

Punishment For Criminal Contempt

"A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court."

Section 602 of the former Penal Law of the State of New York provides:

Indictment For Contempt

"Punishment for a contempt, as prescribed in Article nineteen of the Judiciary Law, does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment."

Section 1938 of the former Penal Law of the State of New York provides:

Punishment When Different Penalties Are Provided By Different Provisions of Law

"An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

Section 750 Judiciary Law of the State of New York provides:

Power of Courts to Punish For Criminal Contempts

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

7. Wilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the Judiciary Law, or to rules adopted pursuant thereto, or to any other statute relating thereto, or refusal to be sworn as provided therein, or subjection of an employee to discharge or penalty on account of his absence from employment by reason of jury service in violation of this chapter. Applications to punish the accused for a contempt specified in this subdivision may be made by notice of motion or by order to show cause, and shall be made returnable at the term of the Supreme Court at which contested motions are heard, or of the county court if the Supreme Court is not in session."

Section 755 of the Judiciary Law of the State of New York provides:

"When punishment may be summary; where the offense is committed in the immediate view and presence of the court . . . upon a trial or hearing, it may be punished summarily . . ."

Facts

The Regular April 1964 Grand Jury, as duly extended by orders of the Supreme Court, had been conducting an investigation, since September 1965, into an alleged criminal conspiracy to commit the crimes of bribery, extortion, usury and other related crimes in the County of Kings, and the use of certain legitimate business enterprises as a cover for monies obtained from said criminal activities.

The defendant-appellant was subpoenaed to testify before said Grand Jury on October 14, 1965. Appellant after being duly sworn refused to answer any of the questions propounded to him based upon his respective Federal and State privilege against self-incrimination, and the belief that the Grand Jury inquiry was irrelevant, improper and immaterial.

Thereafter, at the request of the District Attorney of Kings County, the Grand Jury voted to grant appellant full and complete immunity pursuant to former Penal Law Section 2447. Despite the grant of full and complete immunity, the appellant persisted in asserting his privilege against self-incrimination, and continued to challenge the propriety, relevancy and materiality of the Grand Jury's investigation and questions propounded.

On October 20, 1965, the District Attorney applied to the Justice presiding in Criminal Term Part I of the Supreme Court of the State of New York for a direction to the appellant herein to return to the Grand Jury and answer the questions propounded.

The Court conducted a hearing in open court, heard argument by counsel, and received briefs from the respective

parties. The Presiding Justice, Hon. Hyman Barshay thereafter directed all of the parties to appear before the court on December 7, 1965, at which time the defendant was directed by the Presiding Justice to return to the Grand Jury room and answer the questions propounded. The Presiding Justice found that the Grand Jury was in fact conducting a material and relevant investigation pursuant to law, and that the questions propounded were material and relevant to the proper conduct of that investigation.

After hearing said direction of the Presiding Justice appellant herein informed the court, that his position was unchanged and that he refused to return to the Grand Jury to answer any questions.

The Appellant was then adjudged to be in civil contempt pursuant of Section 750 sub 3 the Judiciary Law of the State of New York, and the Appellant was sentenced to a term of 30 days in the Civil Prison in the City of New York and a fine of $250. The proceedings were adjourned to December 15, 1965 to afford the appellant an opportunity to reconsider his refusal to obey the court's mandate and direction to testify, and to afford the District Attorney the opportunity to prepare the commitment order.

On December 15, 1965, the position of the appellant was unchanged and the Presiding Justice signed the commitment order. The entire proceedings aforementioned were reviewed and sustained by our Appellate Courts, and certiorari was denied by the United States Supreme Court. (*Matter of Koota* v. *Colombo*, 50 Misc. 2d 583, 25 A.D. 2d 497, 17 N.Y. 2d 147; and cert. den. 384 U.S. 1001.)

While the petition for a writ of certiorari was pending in the United States Supreme Court, the stay of execution

of the commitment order granted by the Appellate Courts expired, and on May 9, 1966, the Presiding Justice refused any further stay. The offer of the appellant herein, on May 9, 1965, to appear before the Grand Jury and testify was refused by the District Attorney and the appellant was committed and served his thirty day jail sentence and paid a $250 fine.

Thereafter on October 10, 1966, the Kings County Grand Jury returned an indictment against the appellant Joseph Colombo, charging him with violation of (Section 600, subdivision 6, of the former Penal Law), for contumaciously and unlawfully refusing to testify after being duly sworn.

The defendant-appellant thereafter moved to dismiss the respective indictment which motion was granted by orders of Hon. Vincent D. Damiani, a Justice of the Supreme Court of the County of Kings. The Court having stated that the District Attorney should have presented evidence to the Grand Jury of the defendant-appellant's offer to appear before the Grand Jury at the time of his surrender on May 9, 1965, pursuant to commitment order.

An appeal from the dismissal order was taken to the Appellate Division of the Supreme Court, Second Judicial Department, which on June 16, 1969, reversed the decision of the lower court. The opinion of the Appellate Division clearly recited that ". . . the evidence before the Grand Jury would, if unexplained or uncontradicted, warrant a conviction for violation of subdivision 6 of section 600 of the Penal Law of 1909 (Code Crim. Pro., sec. 251)." *People* v. *Colombo*, 32 A.D. 2d 812; *People* v. *Gallo*, 32 A.D. 2d 812.

On July 7, 1969, Chief Judge Stanley Fuld of the New York Court of Appeals granted permission to appellant

Joseph Colombo to appeal from the order of the Appellate Division. On October 30, 1969, the New York Court of Appeals affirmed the order of the Appellate Division of the Supreme Court, Second Department, *People* v. *Colombo*, 25 N.Y. 2d 641, 306 N.Y.S. 2d 258. Thereafter, petitioner made a motion for reargument to the Court of Appeals. On February 26, 1970, the Court of Appeals denied the motion for reargument but amended its remittur by adding the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether the rights of defendant under the Fifth and Fourteenth Amendments were denied. Defendant argued that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense. The Court of Appeals considered his contention and held that there was no violation of the defendant's constitutional rights."

A timely petition for a writ of certiorari was brought before this Court. On October 19, 1970 this Court (per curiam) granted the petition for a writ of certiorari; vacated the judgment and remanded this matter to the New York Court of Appeals for reconsideration in light of *Waller* v. *Florida*, 397 U.S. 387. On June 10, 1971 the Court of Appeals adhered to its prior decision of affirmance (29 N.Y. 2d 1, 323 N.Y.S. 2d 161).

ARGUMENT

POINT ONE

A conviction for contempt under the New York Judiciary Law Sec. 750 does not bar prosecution for criminal contempt under New York Penal Law Sec. 600. The double jeopardy clauses of the state and federal constitutions do not bar prosecution for one by reason of previous punishment for the other.

The double jeopardy clauses of the State and Constitution are applicable only to prosecutions for the same offense. What is proscribed is the status of being twice put in jeopardy; there is no prohibition against being twice punished.* This was observed by Justice Brennan in *Abbate* v. *United States*, 359 U.S. 187, 199 (1959), wherein it was stated:

> "In short, 'the prohibition' is not against being twice punished, but against being twice put in jeopardy . . ." (citing *United States* v. *Ball*, 163 U.S. 662 (1896)

Put another way, the government is not always prepared under all circumstances to vindicate all the interests of law enforcement through the vehicle of a single proceeding. *United States* v. *Jorn*, 400 U.S. 470, 91 S. Ct. 547, 556 (1971).

Indeed, as this Court wrote in *United States* v. *Dixon*, 347 U. S. 381, 385 (1954);

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* *Price* v. *Georgia*, 398 U.S. 323, 326 (1970); *Downum* v. *United States*, 372 U.S. 734, 736 (1963); *United States* v. *Mirra*, 220 F. Supp. 361, 363 (S.D.N.Y. 1963).

> "Clearly Congress may impose both a criminal and civil sanction in respect to the same act; this is neither unusual nor constitutionally objectionable. See *Helvering* v. *Mitchell,* 303 U.S. 391, 399-400 (1938)."

Thus, if the sanctions imposed are not both criminal, the double jeopardy clause is not offended.

In the case at bar, the Petitioner was convicted of a contempt under Sec. 750 of the Judiciary Law. Such a contempt has long been recognized as civil in nature, in New York. *People ex rel Sherwin* v. *Mead,* 92 N.Y. 415 (1883); *People* v. *Meakin,* 133 N.Y. 214 (1892). Quite clearly when a defendant possesses the keys to the prison door (consenting to testify) the purpose of the contempt citation is strictly of a coercive nature. *Matter of Second Additional Grand Jury of County of Kings* v. *Cirillo,* 16 A.D. 2d 605, 607 (2d Dept. 1962) affd. 12 N.Y. 2d 206 (1963). The conditional nature of the imprisonment based upon the contemnor's continued defiance justifies holding civil contempt proceedings absent the safeguard of indictment and jury. *Uphaus* v. *Wyman,* 360 U.S. 72 (1959).

On the other hand, a sentence imposed under authority of Sec. 600 of the former Penal Law has punishment and not coercion as its source and function. It should be observed at this juncture that should a defendant be convicted of both contempts the court must take into consideration the previous punishment (former Penal Law Sec. 602).

This dichotomy between the two offenses was recognized in New York in *People ex rel Sherwin* v. *Mead, supra,* where the Court said, at p. 420:

> "One who disobeys the lawful order of a court not only offends against the dignity of the particular

> tribunal, but also against the public law . . . The statute contemplates that both remedies, or either may be pursued. If the court has first moved and proceeded against the offenders by attachment and inflicted punishment, he may nevertheless be indicted for the same wrong, but in that event the sentence is to be affected by the previous punishment."

Similarly, the Court of Appeals reaffirmed its position in *People* v. *Meakin, supra* at p. 225.

> "These provisions have been embodied in our law for a long time (2 R.S. 207, 208); and it has never been supposed that a punishment under either law was a bar to a proceeding under the other (*Bishop on Crim. Law,* Sec. 1067)."

This viewpoint was most recently reaffirmed in *People* v. *Costello* and *Marangello,* 21 N.Y. 2d 967 (1968) where the Court of Appeals refused to disturb a conviction for criminal contempt which followed a conviction for contempt pursuant to Sec. 750 (a, 5) of the Judiciary Law. The Court rejected the assertion that to permit such prosecution subjected them to double punishment in violation of the defendant's constitutional and statutory rights.

It is therefore a clearly established policy in New York that there is a distinct dichotomy between criminal contempt under Section 750 of the Judiciary Law, and criminal contempt as a misdemeanor under Section 600 of the former Penal Law. This is so not only because the contempt in each instance flows from a different statute, but because the time honored tests for whether contempt is criminal or civil is met.

Since at least the time of *Gompers* v. *Buck's Stove and Range Co.* 221 U.S. 418 (1911), the test of whether contempt

be criminal or civil is determined not by the fact of punishment, but rather the character and purpose of the contempt citation.

> "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive to vindicate the authority of the court." *Gompers* v. *Buck's Stove and Range Co.*, *supra* at p. 441.

The Court went on to observe:

> "It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*." *Gompers* v. *Buck's Stove and Range Co.*, *supra* at p. 443.

This test was followed by this Court as recently as 1966 in *Shillitani* v. *United States*, 384 U.S. 364, 368:

> "We believe that the character and purpose of these actions clearly render them civil rather than criminal contempt proceedings. See *Penfield Co.* v. *Securities & Exchange Comm'n*, 330 U.S. 585, 590, 91 L. Ed. 1117, 67 S. Ct. 918 (1947). As the distinction was phrased in *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 55 L. Ed. 797, 809, 31 S. Ct. 492 (1911), the act of disobedience consisted solely ' in refusing

> to do what had been ordered,' in refusing to do what had been ordered, i.e. to answer the questions, not 'in doing what had been prohibited.' And the judgments imposed conditional imprisonment for the obvious purpose of compelling the witness to obey the orders to testify. When the petitioners carry 'the keys of their prison in their own pocket,' In re Nevitt, 117 F. 448, 461 (C.A. 8th Cir. 1902), the action is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees. *Green* v. *United States,* 356 U.S. 165, 197 2 L. Ed. 2d 672, 696, 78 S. Ct. 632 (1958) (Black J. dissenting)."

This test is applicable and determinative regardless of whether the contemnor be ordered imprisoned for a definite period. *Yates* v. *United States,* 355 U.S. 66 (1957). It is what the court seeks to accomplish rather than the fact of imprisonment which governs. (See also *Fireman's Fund Insurance Co.* v. *Myers,* 439 F. 2d 834, 837 (3rd Cir. 1971). Judicial contempt, where punishment is remedial and the sentence coercive, is not a crime in the constitutional sense.

The federal courts have long held that the double jeopardy clause of the constitution is not violated by a criminal prosecution for contempt, even though the contemnor has previously been punished summarily or otherwise by the court for his contempt. In *Lewinson* v. *United States,* 278 F. 2d 421 (7th Cir. 1921), cert. den. 258 U.S. 630 (1922), the defendant was punished for contempt in violating a so-called "liquor injunction" under the Volstead Act. The court held that even though the very same act was also punishable under a criminal statute there was no violation of the double jeopardy clause.

The question involved in the case at bar was also found in *Mirra* v. *United States,* 220 F. Supp. 361 (S.D.N.Y. 1963) where Judge Edelstein held that the double jeopardy clause of the United States Constitution does not prevent the prosecution for assault of a defendant who hurled a chair at an Assistant United States Attorney and who was summarily held in contempt and sentenced to one year imprisonment.

In *United States* v. *Rollerson,* 308 F. Supp. 1014, 1018 (D.C. D.C. 1970) the Court in holding that a criminal prosecution arising out of and subsequent to a summary contempt conviction does not offend the policy underlying the protection against double jeopardy, stated:

> "The separate interests of the Federal Court in itself protecting the dignity of the Court, and of the Federal prosecuting authority in initiating action to protect persons and property, recognized in *Mirra,* have consistently been recognized by the Courts. That separate interests in different governmental interests will support convictions under separate statutes making criminal the same acts which injure both interests was fully recognized by Justice Brennan in *Abbate* v. *United States,* 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959)."

POINT TWO

The decision in *Waller* v. *Florida* does not bar this prosecution of the Petitioner for criminal contempt.

The case at bar is distinguishable from this Court's recent holding in *Waller* v. *Florida,* 397 U.S. 387 (1970). In *Waller,* the defendant was charged with the destruction of city property and disorderly conduct by the City of St.

Petersburg for his part in the unlawful removal and taking through the City streets of a mural from the St. Petersburg City Hall. Waller was found guilty of both counts in the municipal court and sentenced to 180 days imprisonment.

Subsequently, he was charged by an information by the State of Florida with grand larceny. It was conceded that the information was founded upon the identical acts for which the defendant had been convicted in the municipal court. This Court held that the second prosecution constituted double jeopardy, and hence was violative of the Fifth and Fourteenth Amendments.

Does the *Waller* case mandate a reversal of the established law of this State in respect to our contempt procedures? This answer should be in the negative. The Legislature of the State of New York has made it very clear that in an appropriate situation, an individual may be prosecuted for contempt both under the Judiciary Law and under the Penal Law. Section 602 of the former Penal Law of the State of New York provides:

> "Punishment for contempt as described in Article 19 of the Judiciary Law does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment, the Court in sentencing him must take into consideration the previous punishment."

The similarity which exists between the instant case and the *Waller* decision is tangential at best. In both cases, the defendant committed an initial wrongful act that became the basis for two separate court proceedings, but in the *Waller* case, the initial wrongful act was the only act involved. The wrong was committed against the State of

Florida when the defendant removed the painting from City Hall. The State of Florida hence could only punish the defendant once for that wrongful act. The instant case is completely different. The initial wrongful act was committed against the State of New York when the defendant refused to testify in the Grand Jury after being granted immunity, the wrong being that the State of New York is entitled to every man's evidence which it feels will benefit the community as a whole. Thereafter, the appellant committed a second and a completely distinctive wrongful act. The appellant, in open court, refused to obey the lawful order of the Supreme Court Judge who directed him to return to the Grand Jury and testify, this wrong being committed against the dignity of the court, and constituting a civil contempt.

Thus the case at bar is distinguishable from *Waller* v. *Florida, supra,* which merely terminated the fiction that City and State are separate sovereignties. *Waller* can only hold that a person may not be tried by the State after previously being convicted by a municipality for the very same acts.

In *Waller,* the State sought to enact bifurcated statutory punishment through a State-Municipal dichotomy. In the instant proceeding, we are only concerned with the propriety of our contempt procedure. Our State's protected social interests warrant different legal sanctions in contempt cases. The petitioner committed two different acts which manifested itself into two different wrongs. One punishment is for violation of the law created by the legislature and the other for an offense against the judiciary. The interests to be protected are different and warrant separate and individual treatment.

In the final analysis, the wisdom of New York's policy is not at issue. Indeed, there may be those who would proceed differently in drafting legislation to deal with witnesses who balk at testifying before Grand Juries. We merely contend that New York has the right to proceed as it has done and that the double jeopardy clause does not thwart New York's time old practice. The conviction should be affirmed not merely because we in New York think it is proper, but rather because there is nothing in the constitution holding that it is improper.

CONCLUSION

The petition for the Writ of Certiorari should be denied.

Dated: Brooklyn, New York
October 1, 1971

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-352

JOSEPH COLOMBO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

POINT I—The appellant was adjudged to be in contempt of court on December 15, 1965 for his refusal to obey a lawful order and mandate of Justice Barshay in refusing to return to the Grand Jury and testify before that body after being afforded full and complete immunity 1

POINT II—The petitioner was indicted under the Penal Law for his refusal to testify before the Grand Jury on October 14, 1965. This criminal contempt constitutes a separate wrong, distinct from the civil contempt committed in the presence of the Court on December 15, 1965. The double jeopardy clauses of the State and Federal Constitutions do not bar prosecution for one, by reason of the previous punishment of the other 5

POINT III—The appellant's offer to testify before the Grand Jury on May 9, 1966 was rejected by the District Attorney. This rejection does not bar a filing of an indictment for criminal contempt on October 10, 1966 10

CONCLUSION 13

Authorities Cited

Cases

	PAGE
Matter of Douglas v. Adel, 269 N.Y. 144 (1953)	3, 8
In re Debs, 158 U.S. 564 (1895)	3, 8
People v. Riela, 7 N Y 2d 571 (1960)	6
People v. Saperstein, 2 N Y 2d 210 (1957)	6
In the Matter of Amato, 204 Misc. 454 (1923)	7
People v. Colombo, 29 N Y 2d 1 at page 4	8
Jurney v. MacCracken, 294 U.S. 125 (1934)	8
People ex rel. Sherwin v. Mead, 92 N.Y. 415 (1883) ..	8
Shillitanti v. U. S., 384 U.S. 364, 16 L. ed. 2d 622, 86 S. Ct. 1531 (1966)	9
Koota v. Columbo, 17 N Y 2d 147 (1966)	10

Statutes

Judiciary Law of the State of New York, Section 750 subdivision 3	2, 7
Article 19 of the Judiciary Law	3, 7
Section 602 of the former Penal Law of the State of New York	7

United States Constitution

Fifth Amendment	7, 9

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JOSEPH COLOMBO,

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

POINT I

The appellant was adjudged to be in contempt of court on December 15, 1965 for his refusal to obey a lawful order and mandate of Justice Barshay in refusing to return to the Grand Jury and testify before that body after being afforded full and complete immunity.

The appellant was subpoenaed to testify before the Kings County Grand Jury on October 14, 1965. The appellant after being duly sworn, refused to answer any of the questions propounded to him based upon his respective federal and state privilege against self-incrimination. Thereafter, at

the request of the District Attorney of Kings County, the Grand Jury voted to grant the appellant full and complete immunity pursuant to former Penal Law Section 2447. Despite the grant of full and complete immunity, the appellant persisted in asserting his privilege against self-incrimination and continued to challenge the propriety, relevancy and materiality of the Grand Jury investigation.

On October 20, 1965, the District Attorney applied to the Justice presiding in Criminal Term, Part I of the Supreme Court of the State of New York, for a direction to the appellant to return to the Grand Jury and answer the questions propounded. The Court then conducted a hearing in open court, heard arguments by counsel and received briefs from the respective parties. Justice Hyman Barshay adjourned the proceeding until December 8, 1965, wherein he stated he would rule on any objections made by the appellant. On that date, Justice Barshay found that the Grand Jury investigation was proper, and directed the witness to return to the Grand Jury to testify. After hearing said direction of the presiding Justice, the appellant informed the Court that his position was unchanged and that he would refuse to return to the Grand Jury and answer any questions. The appellant was then adjudged to be in contempt of Court, pursuant to Section 750, subdivision 3 of the Judiciary Law of the State of New York, and the appellant was sentenced to a term of 30 days in the Civil Prison in the City of New York, and a fine of $250.00.

Proceedings were then adjourned to December 15, 1965, to afford the appellant an opportunity to reconsider his refusal to obey the Court's mandate. On December 15, 1965,

the position of the appellant was unchanged, and the presiding Justice signed the commitment order.

Thus, the contempt which was committed on December 15, 1965, was a civil contempt of Court, wherein the appellant refused to obey the lawful mandate of Justice Barshay who directed the appellant to return to the Grand Jury to answer legal and proper interrogatories. Justice Barshay never posed any questions to the appellant pertaining to the Grand Jury investigation. Justice Barshay only determined that the proceeding in the Grand Jury was a proper one and that the appellant should answer questions posed to him by the Grand Jury. It was the appellant's refusal to obey the lawful mandate to return to the Grand Jury which was the basis of the contempt of December 15, 1965.

The inherent power of the Courts to punish summarily for contempt have been unquestioned since the English Common Law. This power stems from the duty of the courts to preserve order, to prevent the interruption of their proceedings, to maintain the respect and authority due the court and to prevent disorderly contemptuous or insolent behavior. See: Matter of *Douglas* v. *Adel,* 269 N.Y. 144 (1953).

The purpose of permitting summary punishment for contempt, as opposed to the usual process of charge and trial, was stated by the United States Supreme Court in *In re Debs,* 158 U.S. 564 (1895), at pp. 594-595;

> "The power of a court to make an order carries with it the equal power to punish for a disobedience

> of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

It may be conceded that this summary method of dealing with direct contempt is an anomaly in our law, which guarantees due process of law. However, it grows out of necessity, and is deemed essential in order to enable the courts to preserve their existence and power and to confer upon society the benefits which they are entitled to obtain. In the case at-bar, the Grand Jury was engaged in an investigation into the use of legitimate business enterprises as a cover for various criminal activities. The appellant's testimony was necessary in this inquiry. The immediate concern of the District Attorney was not to punish the witness for contempt, but rather for him to testify before the Grand Jury. It was for this reason that the witness was given full and complete immunity. It was also for this reason that the witness was brought before Justice Barshay, and directed to answer questions. It was believed that a direction and order from Justice Barshay would unseal the lips of the witness, but even after Justice Barshay ordered the witness to return to the Grand Jury, this mandate was refused. Therefore, the witness was properly adjudged to be in contempt of court on December 15, 1965.

POINT II

The petitioner was indicted under the Penal Law for his refusal to testify before the Grand Jury on October 14, 1965. This criminal contempt constitutes a separate wrong, distinct from the civil contempt committed in the presence of the Court on December 15, 1965. The double jeopardy clauses of the State and Federal Constitutions do not bar prosecution for one, by reason of the previous punishment of the other.

The indictment for criminal contempt was based upon the appellant's original refusal to answer questions in the Grand Jury on October 14, 1965. On this date, as indicated in Point I of this brief, the appellant refused to answer any questions, after being granted immunity and asked for a hearing to determine the relevancy of the proceedings. This request was granted by the Assistant District Attorney, and on October 20, 1965, a hearing was held in Criminal Term, Part I of the Supreme Court, before Justice Hyman Barshay. On December 8, 1965, Justice Barshay formally ruled that the contention of the appellant was ill founded, and therefore, he was directed to return to the Grand Jury to testify.

The necessary elements to find an indictment for criminal contempt was satisfied on December 8, 1965, when Justice Barshay ruled that the Grand Jury proceeding was proper, and the appellant was afforded full and complete immunity, and, was mandated to return to the Grand Jury to testify. The appellant, at this time, stipulated through counsel, that he would waive the formal requirement of returning to the Grand Jury and having the foreman of the Grand Jury direct him to answer questions. This requirement according to the laws of State of New York is necessary to

establish the element of the witness's contumacious and unlawful refusal to answer questions. (*People* v. *Riela*, 7 N Y 2d 571 (1960).) The other elements necessary to complete the crime of criminal contempt were already satisfied on October 14, 1965. In order to prove the crime of criminal contempt, the following elements must be shown;

1. That the defendant did unlawfully and contumaciously refuse to answer a legal and proper question before the Grand Jury.

2. That the quorum of the Grand Jury was present at all times, on any such day when the defendant testified and when the indictment was voted.

3. That the question which is claimed that the defendant refused to answer was a legal and proper one.

4. That any such question asked of the defendant, and which, it is charged he refused to answer, was relevant and germane to the investigation being conducted by the Grand Jury.

5. That the defendant was duly sworn as a witness and contumaciously and unlawfully refused to answer any such legal and proper question. (*People* v. *Saperstein*, 2 N Y 2d 210 (1957).)

Thus it was indeed proper for the Grand Jury to find an indictment of criminal contempt for the appellant's refusal to answer questions on October 14, 1965.

This indictment for criminal contempt is separate and distinct from the civil contempt committed before the Court on December 8, 1965. The refusal of the witness to obey the lawful mandate of the Presiding Justice in the Criminal Term, Part I, of the Supreme Court constituted a separate and distinct wrong, punishable by civil contempt and a fine.

The appellant availed himself of the Court's presence on October 20, 1965, and again repeated his refusal to testify. Appellant maintained that by this second and distinct refusal, he has successfully nullified the sanctions of the Penal Law and in effect has foreclosed any punishment under the Penal Law. Obviously, if appellant's contentions are upheld, it would be within the power of a witness to obstruct justice by the simple process of refusing to testify in a Grand Jury and then repeating this refusal before a Judge.

The New York State Legislature has made it very clear that in an appropriate situation, an individual may be prosecuted for contempt both under the Judiciary Law and under the Penal Law. Section 602 of the former Penal Law of the State of New York provides:

> "Punishment for contempt as described in Article 19 of the Judiciary Law does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment, the court in sentencing him must take into consideration the previous punishment."

Does this legislative mandate of the State of New York violate the Fifth Amendment of the United States Constitution? The courts of our State have repeatedly answered this question in the negative. Typical of the views of the New York Court is the opinion *In the Matter of Amato*, 204 Misc. 454 (1923), where the court said at page 458:

> "In the first place, a civil proceeding to punish for criminal contempt and a criminal prosecution for the misdemeanor of criminal contempt are wholly independent of each other. The law contemplates that both remedies or either may be pursued."

Again at page 456:

> "In this connection, it is to be noted that the doctrine of former jeopardy does not apply to civil proceedings to punish a witness for criminal contempt, . . . for the object and purpose of such proceedings is not only to vindicate and preserve the power, integrity and dignity of the courts, but also to compel the performance of some order or decree of the court which it is within the power of the witness to perform, or to perform a public duty which the witness is bound to perform. . . ."

This case follows a long line of earlier cases involving the double jeopardy aspects of the contempt situation. It was recognized quite early that the contempts are distinct and separate and no constitutional violation is involved where the defendant is tried and punished pursuant to both criminal contempt statutes. (See: *Matter of Douglas* v. *Adel*, 269 N.Y. 144 (1935); *In Re Debs*, 158 U.S. 564 (1894); *Jurney* v. *MacCracken*, 294 U.S. 125 (1934); *People ex rel. Sherwin* v. *Mead*, 92 N.Y. 415 (1883).)

After careful examination of the events in this proceeding, it is apparent that appellant committed two separate and distinct acts, each a separate and distinct wrong, each violative of, and punishable under a separate and distinct statute. Moreover, as noted in Justice Jasen's opinion in *People* v. *Colombo*, 29 N Y 2d 1 at page 4, "that the punishment under the Penal Law and the citation for contempt of court (under the Judiciary Law) are designed to serve different purposes. The former protects the interest of the State to obtain evidence which will benefit the community as a whole, while the latter serves to protect the integrity and vindicate the power of our courts."

Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. The rationale being simply that an individual should not be uncertain of punishment which will be inflicted upon him for a wrong that he may have committed. He should only be punished once for that wrong. Such uncertainty does not exist in the case at bar. The appellant in the case at bar, was informed in both separate proceedings that punishment will be imposed upon him if he persisted in his refusal to testify. The legislative mandate of the Penal Law was explained to him in the Grand Jury, and he was informed that his refusal to testify would be a violation of the Penal law. He was thereafter informed of the consequences of his refusal to comply with the legal mandate of the Supreme Court Justice, who was presiding in Part I of the Criminal Term of the Supreme Court. The choice was for the appellant to make; he knew the alternatives and the consequences of his choice.

Does this policy offend the people of a free society? Should not a government be able to punish an individual for his obstructiveness? Surely the testimony of the people who have knowledge of important facts is essential if many of the processes of government are to function at all. The right of every government to ask its citizens for truthful testimony should not and does not violate the Fifth Amendment of our Constitution and our concept of fairness.

POINT III

The appellant's offer to testify before the Grand Jury on May 9, 1966 was rejected by the District Attorney. This rejection does not bar a filing of an indictment for criminal contempt on October 10, 1966.

It is quite clear that a refusal to obey a court order to testify in a Grand Jury proceeding may form the basis of a civil contempt, *Shillitanti* v. *U. S.*, 384 U.S. 364, 16 L. ed. 2d 622, 86 S. Ct. 1531 (1966). In the *Shillitanti* case, the facts are remarkably similar to the case at bar. In that case Shillitanti was called before the Grand Jury investigating possible violations of the Federal Narcotic's Laws. At the Government's request, the District Judge then granted him immunity and ordered him to answer the question. When called before the Grand Jury again, Shillitanti persisted in his refusal to answer questions and the District Court Judge found him guilty of Criminal Contempt. The defendant in that case was given a two year prison sentence for his contumacious conduct. The Court found that this was a civil contempt, and therefore, it was unnecessary to have an actual trial in the matter, and it was permissible for the District Judge to impose such a sentence. In finding that this was a civil contempt, the Court reasoned that one must look at the purpose of the proceedings, to determine if it is a civil or criminal contempt. There, as in the case at bar, the People were not looking to punish the witness, but were interested in obtaining evidence for the Grand Jury. It was for the same reason in the instant case, that the District Attorney on October 20, 1965, offered to drop the proceedings against the appellant, if he returned to the

Grand Jury and testified. This offer remained open until December 15, 1965, when Justice Barshay finally signed the commitment order. It should be noted that appellant was afforded every procedural safeguard required in this contempt proceeding. Chief Judge Stanley Fuld in reviewing the aforementioned proceedings declared in the matter of *Koota* v. *Columbo*, 17 N Y 2d 147:

> "The appellants complain that they were subjected to 'summary' treatment at trial, depriving them of due process by denying them an adequate opportunity to contest the propriety of the questions. However, whether or not the court could have acted summarily (see People v. Hackley, 24 N.Y. 74, 79-80)—the record establishes that the proceedings below were neither 'summary' nor lacking in 'due process'. (See People ex rel. Cirillo v. Warden, 11 N Y 2d 51, 53.)
>
> Section 751 of the Judiciary Law provides that, in other than summary proceedings, 'the party charged (with contempt) must be notified of the accusation, and have a reasonable time to make a defense.' Here, the appellants were afforded ample notice of the proceedings; they were represented by counsel, apprised of the relationship between their testimony and the purposes of the grand jury inquiry and given every opportunity to explain their contumacious behavior. Moreover, each lawyer was supplied with the grand jury minutes covering the appearance of his client and given permission to submit a brief after the proceedings were adjourned. Six weeks later, when the trial judge had given full and thorough consideration to the appellants' contentions, they were afforded additional opportunities to justify their silence or to purge themselves of contempt. At no time did they offer any evidence to support the charge that the district attorney was acting in bad faith. Manifestly,

> the appellants were accorded every procedural safeguard to which they were constitutionally entitled. (See Matter of Ushkowitz, 15 N Y 2d 713; People ex rel. Cirillo v. Warden, 11 N Y 2d 51, supra; see, also, Murphy v. Waterfront Commissioner, 378 U.S. 52.)"

On May 9, 1966, the appellant offered to testify before the Grand Jury, and this offer was rejected. It is impossible to speculate the reasons for the refusal of the District Attorney to accept this offer. The record is barren of such information, but it is indeed obvious that the appellant's appearance before the Grand Jury on May 9, 1966 was no longer necessary, and therefore, the offer was refused. The need obviously was quite necessary on October 14, 1965, December 8th and December 15, 1965; and on these dates appellant thwarted the Grand Jury inquiry. The position of the appellant on the aforesaid dates was aimed at the obstruction of the legitimate Grand Jury inquiry.

It is indeed true that in a civil contempt proceeding, the contemnor should be allowed to purge himself, but the time made available for the contemnor to purge himself must be reasonable under the circumstances. In the instant case, the appellant offered to testify almost five months after he was found to be in contempt of court. Also, the coercive effect of a civil contempt must be examined when the testimony is necessary, not when the testimony may become futile to the Grand Jury. In fact, the date on which punishment is actually meted out is the more realistic date for assessing whether it is coercive or not, and once the need for the testimony is over, the sentence could hardly be coercive at that time.

Thus it becomes readily apparent that the appellant did in fact have an opportunity to purge himself of his contempt from October 20, 1965 until December 15, 1965. On May 9, 1966, such testimony was no longer necessary and therefore, Justice Barshay had no other alternative but to adhere to his original order of December 15, 1965.

CONCLUSION

The petition for the Writ of Certiorari should be denied.

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COLOMBO *v.* NEW YORK

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 71-352. Decided February 22, 1972

itioner refused to answer a grand jury's questions despite a rant of immunity. A trial judge found the questions to be roper and directed petitioner to answer. Petitioner refused, and he judge found that by "his contumacious and unlawful re- usal . . . to answer any legal and proper interrogatories and or his wilful disobedience to the lawful mandate of this Court" etitioner had "committed a criminal contempt of court" in iolation of N. Y. Judiciary Law § 750. He was sentenced to 0 days and fined $250. His offer to testify thereafter was refused nd he paid his fine and served his sentence. Petitioner was hen indicted under N. Y. Penal Law § 600 "for his contumacious nd unlawful refusal . . . to answer legal and proper interroga- ories." The trial court dismissed the indictment on double eopardy grounds, but the appellate court reversed. The New ork Court of Appeals, sustaining the reversal, held that there ere two acts of contempt, one before the grand jury, and the ther the refusal to obey the court order, and that the trial udge had committed petitioner for civil, not criminal, contempt. *eld:* Petitioner was penalized for criminal contempt for purposes f the Double Jeopardy Clause, and in view of the state court's isconception of the nature of the contempt judgment, and the ubstantial question of state law arising from the State's response hat it considers the two acts of contempt as being partially ntertwined, the judgment is vacated and the case is remanded o the state court.

tiorari granted; 29 N. Y. 2d 1, 271 N. E. 2d 694, vacated and emanded.

PER CURIAM.

Despite a grant of immunity in response to the asser- n of his Fifth Amendment privilege not to be a wit- s against himself, petitioner refused to answer ques- ns put to him before a Kings County, New York, grand y. On December 7, 1965, a trial judge found that

the questions put had been proper and directed petitioner to answer them. Petitioner refused; the trial court, after allowing petitioner a week's time to change his mind, signed a commitment order stating that by "his contumacious and unlawful refusal after being sworn as a witness to answer any legal and proper interrogatories and for his wilful disobedience to the lawful mandate of this Court" petitioner had "committed a criminal contempt of court in the immediate view and presence of the Court and that said contempt was wilful and unlawful and in violation of Section 750 of the Judiciary Law of the State of New York . . . ." Petitioner was sentenced to 30 days and fined $250.

Appellate proceedings proved fruitless. Petitioner then offered to testify, the offer was refused, and petitioner paid his fine and served his sentence. On October 10, 1966, petitioner was indicted under § 600, subd. 6, of the New York Penal Law of 1909 "for his contumacious and unlawful refusal, after being duly sworn as a witness, to answer legal and proper interrogatories." The trial court dismissed the indictment on double jeopardy grounds but the appellate court reversed. The reversal was sustained by the Court of Appeals, which concluded that the Fourteenth Amendment and the double jeopardy provision of the Fifth Amendment did not bar the indictment. The court reasoned that petitioner had committed two acts of contempt—one on October 14, 1965, before the grand jury, and the other on December 7 when he refused to obey the order of the judge—and that the trial judge had committed petitioner for civil, not criminal, contempt.

The judgment of the Court of Appeals must be vacated. The judgment of the New York trial court entered on December 15, 1965, was for "criminal contempt," petitioner was sentenced to a definite term in jail and ordered to pay a fine, and neither the prosecutor nor the trial court

considered his offer to testify as sufficient to foreclose execution of the sentence. For purposes of the Double Jeopardy Clause, petitioner was confined and penalized for criminal contempt. *Yates* v. *United States*, 355 U. S. 66 (1957); see also *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966); *Shillitani* v. *United States*, 384 U. S. 364 (1966); *Oriel* v. *Russell*, 278 U. S. 358 (1929). To the extent that the judgment of the Court of Appeals rested on a contrary view, it must be set aside. It also appears from its supplemental response that the State considers the two acts of contempt on October 14 and on December 7 as being partially intertwined. As we understand it from the State's response, petitioner's refusal to answer on October 14 did not mature into a complete contempt until December 7 when the trial court passed on the propriety of the grand jury's inquiry and petitioner thereafter refused to obey the court's direction to return to the grand jury and answer the questions properly put to him.

In view of the New York Court of Appeals' misconception of the nature of the contempt judgment entered against petitioner for purposes of the Double Jeopardy Clause and in view of the substantial question of New York law that has emerged, we are disinclined at this juncture to entertain and determine the double jeopardy question presented by petitioner. The better course is to grant the petition for writ of certiorari, vacate the judgment of the New York Court of Appeals, and remand the case to that court for further proceedings not inconsistent with this opinion, thus affording that court the opportunity to reconsider the validity of the indictment under the Double Jeopardy Clause of the Constitution.

So ordered.

MR. JUSTICE DOUGLAS, dissenting.

On October 14, 1965, petitioner refused to testify when called before a Kings County, New York, grand jury. When, on December 15, after a grant of immunity

and a judicial inquiry into the validity of the grand jury investigation under state law, the petitioner persisted in his refusal to testify, the presiding judge cited him for contempt and imposed a sentence of 30 days and a fine of $250.[1] Despite petitioner's later willingness to testify, the sentence was executed.

The grand jury then returned an indictment against petitioner charging him with criminal contempt for his refusal to testify.[2] Petitioner successfully moved to quash the indictment, but on appeal it was reinstated and upheld against petitioner's contention that it put him twice in jeopardy for the same offense in violation of the Fifth Amendment. *People* v. *Colombo*, 25 N. Y. 2d 641, 254 N. E. 2d 340. We granted the petition for certiorari, vacated the judgment of the New York Court of Appeals, and remanded for consideration in light of *Waller* v. *Florida*, 397 U. S. 387. 400 U. S. 16. On remand, however, the Court of Appeals adhered to its earlier decision, reasoning that the first citation was for civil contempt while the indictment charged a criminal offense and that "two distinct acts [were] being punished—refusal to testify before the Grand Jury and a separate refusal to obey the lawful mandate of a Supreme Court Justice." 29 N. Y. 2d 1, 3, 271 N. E. 2d 694, 695.

The Court of Appeals' characterization of the December 15 citation as "civil" rather than criminal is not dispositive of the question before us. To be sure, federal courts normally are bound by state court interpretations of state law, but involved here is a question of federal right under the Double Jeopardy Clause. In such cases, federal rather than state law governs. Suffice it to say that a 30-day sentence and a $250 fine imposed for refusal

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[1] This contempt citation rested upon § 750 of the New York Judiciary Law.

[2] The present indictment is founded upon the former § 600 of the New York Penal Law.

to testify before a grand jury constitutes criminal punishment within the meaning of the double jeopardy provision of the Bill of Rights, at least where the witness' willingness to purge himself of contempt by testifying does not result in the vacation of the sentence. *Shillitani v. United States*, 384 U. S. 364, relied upon by respondent, is not to the contrary. There, we held "that the conditional nature of [the] sentences [allowing the contemnors to purge themselves by agreeing to testify] render[ed] each of the actions a civil contempt proceeding . . . ." *Id.*, at 365. In the present case, by contrast, the jail sentence and fine were imposed despite petitioner's willingness to testify.

Nor does the characterization of the two contempts as involving different acts avoid the prohibition against twice being put in jeopardy for the same offense. The 30-day sentence and $250 fine were imposed, *inter alia*, for the petitioner's "refusal after being sworn as a witness to answer any legal and proper interrogatories." This is precisely the offense charged in the present indictment. Respondent lists five elements [3] for the offense of

[3] Respondent says that "[i]n order to prove the crime of criminal contempt, the following elements must be shown:

"1. That the defendant did unlawfully and contumaciously refuse to answer a legal and proper question before the Grand Jury.

"2. That the quorum of the Grand Jury was present at all times, on any such day when the defendant testified and when the indictment was voted.

"3. That the question which is claimed that the defendant refused to answer was a legal and proper one.

"4. That any such question asked of the defendant, and which, it is charged he refused to answer, was relevant and germane to the investigation being conducted by the Grand Jury.

"5. That the defendant was duly sworn as a witness and contumaciously and unlawfully refused to answer any such legal and proper question." Supplemental Brief 6.

All of these elements—with the exception of the proviso "when the indictment was voted" which relates to the sufficiency of the indictment rather than being a separate element of the offense—were

criminal contempt. All of these elements were necessarily included in the trial court's earlier citation for "civil" contempt. Petitioner need not "run the gantlet" on this offense a second time.[4] *Green* v. *United States*, 355 U. S. 184, 190.

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plainly included in the "civil" contempt. The "witness's contumacious and unlawful refusal to answer questions," *ibid.*, stems from the refusal to obey the trial court's order which also formed the basis for the December 15 citation.

[4] I agree with MR. JUSTICE BRENNAN'S concurring opinion in *Ashe* v. *Swenson*, 397 U. S. 436, 453–454, where he said:

"In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. This 'same transaction' test of 'same offence' not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience." (Footnotes omitted.)

It would be repugnant to these views to allow a separate criminal prosecution and punishment for each day, hour, or minute that a witness refused to testify before a grand jury.